

January 5, 1983



The Vice President  
President of the Senate  
United States Senate  
S-212 The Capitol  
Washington, D.C. 20510

Dear Mr. Vice President:

LIBRARY  
OF  
CONGRESS

I have the honor to transmit to you a copy of the report of the Copyright Office on Section 108 of the Copyright Act, Title 17 of the United States Code, captioned "Limitations on exclusive rights: Reproduction by libraries and archives." This report is mandated by section 108(i) of that statute; and I enclose a copy of that section.

Washington  
D.C.  
20559

Sincerely,

David Ladd  
Register of Copyrights

DL:np  
Enclosure

17 USC 108.

**§ 108. Limitations on exclusive rights: Reproduction by libraries  
and archives**

• • •

(i) Five years from the effective date of this Act, and at five-year intervals thereafter, the Register of Copyrights, after consulting with representatives of authors, book and periodical publishers, and other owners of copyrighted materials, and with representatives of library users and librarians, shall submit to the Congress a report setting forth the extent to which this section has achieved the intended statutory balancing of the rights of creators, and the needs of users. The report should also describe any problems that may have arisen, and present legislative or other recommendations, if warranted.

REPORT OF THE REGISTER OF COPYRIGHTS

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**LIBRARY REPRODUCTION  
OF COPYRIGHTED WORKS  
(17 U.S.C. 108)**

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JANUARY 1983

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BOCES	<u>Encyclopaedia Britannica v. Crooks.</u> 447 F. Supp. 243 (W.D.N.Y. 1978). 542 F Supp. 1156 (W.D. N.Y. 1982).
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N. B. This report is found in App. I of this report.

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2 Washington Hearing	Washington Hearing Transcript, June 20, 1980, App. IV, Part 1.
App. II, Part 2	Comment Letters, Following Chicago Hearing, App. II, Part 1.
App. III, Part 2	Comment Letters, Following Houston Hearing, App. III, Part 1.
App. IV, Part 2	Comment Letters, Following Washington Hearing, App. IV, Part 1.
App. V, Part 2	Comment Letters, Following Anaheim Hearing, App. V, Part 1.
App. VI, Part 2	Comment Letters, Following New York Hearing, App. VI, Part 1.
App. VII	Comment Letters, 80-6, App. VII.



## EXECUTIVE SUMMARY

Chapter One -- Introduction

The introduction identifies the focus of the report: photocopying in libraries. The Copyright Office believes that §108 of the Copyright Act of 1976 provides a workable structural framework for obtaining a balance between creators' rights and users' needs, but that, in certain instances, the balance has not been achieved in practice, either because the intent of Congress has not been carried out fully or because the intent is not clear.

This report treats "balance" as meaning that §108 allows users to use -- by photocopying -- works protected by copyright in a way both consistent with traditional principles of copyright law and library practice and not exceeding a minimal encroachment upon the rights of authors and copyright owners.

Some of the evidence supports a conclusion that a balance now exists; other evidence calls that conclusion into doubt. Several organizations and individuals proposed statutory changes of various types, and the Copyright Office makes (in chapter nine) several statutory and nonstatutory recommendations.

The introduction next discusses the importance of information in today's world, and a philosophical clash between libraries and publishers about how to pursue the goal of efficient widespread dissemination of information. These are followed by a brief note on the importance of precision in the use of language and the nature of the conclusions reached in

this report. Finally, the introduction discusses the difficulty of trying to forecast technological developments and the disappointing lack of successful discussions among the parties concerned with a variety of copyright-photocopying issues.

## Chapter Two -- Background and Legislative History

Debates, drafts, and discussions about photocopying and copyright spanned the twenty-five year period in which the U.S. Copyright Law was revised. Technological changes and the Williams & Wilkins case required Congress to address a variety of important issues concerning both fair use and library photocopying.

Before 1965 a library copying provision had been added to -- and then deleted from -- various proposals to revise the copyright law. A fair use provision was in all revision bills. As the Williams & Wilkins case -- concerning large-scale photocopying in government libraries -- progressed through the courts, specific changes regarding photocopying were proposed, which ultimately resulted in §108. Various organizations, both formal and informal, held meetings and hearings to try to accommodate the disparate views of the proprietary and library communities. Some progress resulted, such as the promulgation of the CONTU guidelines, but for the most part, the major accomplishment was the airing of adverse views, until the current Act was passed in late 1976.

The first version of §108 appeared in 1969, but was significantly different from what is now the law. The hearings and proposals addressing it reflected developments in the Williams & Wilkins case. Over time, provisions concerning what copyright information should be included on photocopies, distinctions between copying small portions and complete works, and

limits to "108" copying were added. Finally, an exception to one of those limits, so as to permit interlibrary transfers of photocopies in lieu of interlibrary loan, was added in 1976.

During the same time, Congress rejected a general not-for-profit exemption, and encouraged the parties in interest to reach voluntary agreements concerning matters about which they disagreed. The "classroom" and "music" guidelines were adopted as a result of such agreements. Shortly thereafter, the CONTU guidelines, designed to quantify certain terms in one subsection of §108, were completed.

One of the final additions to §108 was subsection (i), which mandated this report. In preparing it, the Register of Copyrights appointed a committee of representatives of the interested parties and, on their advice, the Copyright Office held a series of regional hearings on photocopying-copyright issues and let a contract under which a substantial statistical survey was performed.

### Chapter Three -- Balance: Eligibility for §108 Treatment

This chapter addresses the criteria that govern libraries' eligibility for §108 photocopying privileges and the types of works to which those privileges apply. The fundamental rule in subsection (a) is that all copying permitted by §108 involves the preparation of no more than one copy at a time. There is empirical evidence that in roughly one-quarter of the library photocopying transactions in which library materials bearing a copyright notice are copied by library employees, two or more copies are made.

Another requirement is that copies prepared under §108 bear "a notice of copyright." There is a long-standing division of opinion between the library and proprietary communities about the meaning of this requirement. Librarians generally believe that a warning that copyright may protect the material is sufficient; proprietors urge that the formal copyright notice set out in §§401-403 of the law is required. The statute itself, like the legislative history, is ambiguous, but appears to support the latter position. Ideally, the parties should reach an accommodation which satisfies the proprietors' needs without placing undue clerical burdens on the libraries.

Several rules from §108 combine to suggest that §108 privileges are rather limited for special libraries in for-profit entities. They include: (1) the extent to which the library is open to competitors' employees; (2) the meaning of the phrase "indirect commercial advantage"; (3) the extent to which employees, acting within the scope of their employment, should be said to be "supervised" when they prepare photocopies; (4) the extent to which certain transactions are "related or concerted;" and (5) the extent to which the copying done is "systematic."

As to types of works copyable under §108, the broadest privileges apply to literary works. Copying privileges are greatly reduced with respect to musical works, pictorial, graphic, or sculptural works, motion pictures, and non-news audiovisual works. The Music Library Association and the Music Publishers' Association of the United States have proposed a statutory change, which the Copyright Office endorses, to permit, after certain steps are taken, slightly more copying of musical works -- for study, not performance -- under §108.



Foreign works should generally be treated just as are works created and published in the United States.

#### Chapter Four -- Balance: Copying and Other Issues

The question of balance requires an examination of what is occurring in practice as well as a determination of what the law intends. This chapter addresses both topics.

It begins by noting that §108 permits copying not authorized by §107 (the fair use provision) and that fair use is thus not available on a broad and recurring basis once §108 copying limits have been reached. Basically, in examining copying "beyond" §108, one must determine whether the transaction is of a type which could be fair use and, if so, consider, in the fair use calculus, the copying already done under §108. The record suggests substantial confusion about the relationship between these important sections.

The report next addresses the various types of transactions authorized and forbidden under §108. These include preservation copying of unpublished works under subsection 108(b), replacement copying, under certain conditions, of published works under subsection 108(c), "reserve" copying (a fair use issue not strictly within the scope of §108), and various types of copying for and by library users.

Subsection 108(g), which places two different but related "caps" on §108 photocopying, then receives substantial attention. Its bans on "related or concerted" photocopying of which libraries are aware and all "systematic" photocopying except certain interlibrary transactions (unless, in each case, authorized by the copyright owner) -- appear to be a major source of confusion and disagreement. Its history is linked to the

Williams & Wilkins case, and its provisions are the subject of similar debate. An important point, which does not appear to be well-understood, is that libraries do not necessarily obtain fair use privileges from their users. That is, copying which may be fair use, if done by a user, may be "related or concerted" if done by the library: the library may not do the photocopying without permission from the copyright owner.

That §108(g)'s terms are limits on §108 copying is also not completely understood. The structure of the law is clear: §106 grants broad and exclusive rights to copyright owners; §108 places certain limitations on those rights by permitting certain otherwise unauthorized copying to occur. Copying by libraries not permitted by §108 must generally be authorized by the copyright owner or it is an infringement of copyright.

The ban on most systematic photocopying is also less than perfectly understood. The proviso permitting certain interlibrary photocopying has been frequently considered by all concerned, but the general prohibition has not. The CONTU guidelines provide a quantitative rule for some interlibrary transactions, but the overall meaning of "systematic" remains an ideal subject for agreement among the parties.

Users, who obtain no copying privileges for themselves under §108 (all of theirs deriving from §107), are liable for copyright infringement for their photocopying beyond fair use. The library in which infringing copies are made may be liable for its patrons' infringements unless: the copying is unsupervised and it occurs on a machine which bears the required warning.

Although §108 is directed exclusively to copying in libraries and archives, much copying which occurs elsewhere bears on the balance issue. The report discusses copying shops, commercial information brokers, and libraries not eligible for §108 privileges.

The next part of chapter four discusses issues about copyright proprietors — both authors and publishers. Much of the record and many of the copyright-photocopying controversies concern scholarly, scientific, and technical (SST) journals. The authors of the articles which appear in such journals may be less concerned with royalties than "traditional" authors, but the publishers must, of course, be concerned with at least recovering their costs. And of course, publishers do not always require payment for photocopying, but desire to keep some control over their works by requiring clear requests for permission to photocopy.

Since 1978 the Copyright Clearance Center has been in operation. Its publisher members authorize it to grant, in advance, transaction-by-transaction or larger-scale photocopy permissions to library and other members who, in turn, pay periodic fees for photocopying not permitted by §§107-108 according to a publisher-fixed scale. Although publisher and library membership has increased, it is still below original expectations.

#### Chapter Five -- King Report

To augment the record created by the hearings and comment letters, the Copyright Office let a contract for the performance of several statistical surveys. King Research, Inc., performed three surveys of libraries, one of publishers, and two of library patrons. Its report contained a wealth of data concerning several types of photocopying transactions, publisher information, and user experiences.

The complete King Report is Appendix I to this report. The Copyright Office's analysis thereof is chapter five. We do not here summarize its findings, on the ground that any short summary necessarily shapes the reader's impressions. We commend the full King Report, and our analysis, to anyone concerned with copyright-photocopying issues.

### Chapter Six — New Technology

The photocopy machine has introduced stress into the traditional copyright system by diluting the copyright proprietor's ability to control the reproduction of works in traditional print media. The copyright issues that have arisen have been complex and hard to resolve; but, no matter how difficult these have been, the widespread use of new technological media will raise even harder problems. To aid in understanding the magnitude and scope of these problems this chapter surveys the impact of the emerging technologies on librarians, publishers, and the copyright law.

Use of computers has revolutionized the reference functions of libraries and provided new entrepreneurial opportunities for commercial ventures. Document delivery services, however, have not progressed rapidly enough to keep pace with the speed with which bibliographic information may be retrieved. The data base industry supplies two generic products: source and bibliographic data bases. Source data bases supply the user with the data itself, whereas, bibliographic data bases serve the same function as a library and catalog. The widespread availability of these systems has caused librarians to question whether the costs of services of this kind should be passed on to library users. Government information policies also affect this market.

The application of these technologies has led to the growth of library networks which may lead to greater resource sharing and inter-library loan activity.

In the publishing and information dissemination communities, the new technologies are creating new products and markets. Teletext, videotext, electro-optical discs and other new media present both opportunities for and threats to publishers and librarians. The inability of copyright proprietors to control further duplication of works in machine-readable media has caused and will continue to cause stress for the copyright community, and librarians will face increasing concerns over paying for the costs of access and copying.

The chapter ends by calling for serious discussions of how all the parties — users, librarians, authors, and publishers — can take full advantage of the opportunities for improved information dissemination provided by the new technologies.

#### Chapter Seven -- Library Reproduction Abroad: An Overview of Recent Developments

The copyright problems which arise out of library photocopying are not unique to the USA. They arise in all countries, but most acutely in economically advanced nations, which, like the USA, are members of international copyright conventions. Neither of the two principal conventions, the Universal Copyright Convention -- to which the USA belongs -- nor the Berne Convention expressly regulates the domestic treatment of library photocopying. But both conventions, posited upon the principle of treating foreign authors equally with national authors, tend to reinforce practical interdependence and have served as arenas for elaboration of informed international opinion on the matter of library photocopying.

At the intergovernmental level, there is general recognition that the legitimate interests of authors require that domestic law make provision for the payment of a fair remuneration for the reprographic reproduction of protected works, but beyond this general position, no uniform solution at the international level has been found.

At the non-governmental level, international organizations representing publishers continue intensive study and consultations looking toward the development of comprehensive, easy-to-use collective licensing arrangements. Librarians, too, have international non-governmental organizations to represent their collective concerns. The International Federation of Library Associations and Institutions (IFLA) has asserted strongly the view that non-profit reproduction of works for teaching, scholarship and research is a right libraries must be able to perform for their users and that national copyright laws should so provide.

The national laws on photocopying in a number of important states are in a transitional period. Canada is in the process of generally revising its 1924 Copyright Act and is faced with the problem of whether to leave library photocopying to the unelaborated law of "fair dealing" or to adopt a more specific, statutory regime. The situation in the United Kingdom is similar to that of Canada, with the significant difference being that the UK copyright statute contains a specific provision covering non-profit library reproduction of single copies or periodical articles in addition to a "fair dealing" provision.

Governmental studies and reports in the UK have pointed in two not incompatible directions: recommending establishment of a negotiated blanket licensing system, and possibly tightening the single-copying privilege in the statute. The latter would ensure that copying is restricted to

purposes of "research and private studying," specifically excluding "research" carried out for the business ends of a commercial enterprise.

The approach to photocopying and copyright problems taken by Japan is somewhat unique. Japanese copyright law expressly recognizes a right of "personal" reproduction, for oneself, and the right of libraries to reproduce protected works under specific circumstances. Governmental study of the relationship of these two, very different sorts of exemptions produced the view that: the former right did not permit unauthorized copying for users by copying services, nor by coin-operated machines; and, as to the latter, that no change in the law was required.

A number of other states have taken steps to deal more fully with library (and educational) photocopying. Thus, Sweden has had since 1973 a blanket licensing scheme governing copying in educational establishments; so does Denmark, which is considering in a preliminary way possible extension of the system to non-educational institutions. Although the Federal Republic of Germany is quite advanced in developing mechanisms to remunerate copyright owners for a variety of personal reproductions of copyrighted works, its law on library photocopying is still unclear. Implicit in personal and library copying privileges are rather low aggregate quantitative limits, even for single copying.

Legislation is now pending in the FRG which would provide for the payment by the operator of a photocopying machine of compensation for copies made for private or other personal use. The amount of the payment would be based on sampling criteria.

Chapters Eight and Nine -- Legislative Proposals and Copyright Office Recommendations

Chapter eight is a summary and analysis of the various legislative proposals placed in the record during the preparation of this report, and is not further summarized here.

Chapter nine contains various recommendations made by the Copyright Office. The non-statutory recommendations include:

1. The encouragement of collective photocopying licensing arrangements;
2. The encouragement of voluntary guidelines;
3. Studies of possible surcharges on photocopying equipment;
4. Studies of compensation systems based on sampling techniques;
5. Further studies of new technologies issues; and
6. The encouragement of agreements concerning archival preservation issues.

The principal statutory recommendations include:

1. Endorsing the Music Library/Music Publishers' Associations' proposal concerning the photocopying of serious music for research purposes;
2. Endorsing the principle of the "umbrella statute" proposed by the Association of American Publishers;
3. Endorsing enactment of a revision to §108(a)(3) to make it clear that the notice requirement there is the same as the notice requirements of chapter 4 of the copyright law; and
4. Endorsing enactment of an amendment to §§108(d) and (e) to make it clear that unpublished works are not within their scope.



## INTRODUCTION

This report treats the

extent to which this section [§108 of the Copyright Law] has achieved the intended statutory balancing of the rights of creators, and the needs of users [of copy-righted works].

Section 108 is captioned: "Limitations on exclusive rights: Reproduction by libraries and archives." The focus of this report, therefore, is not only on the rights of creators but principally on the practices of libraries, archives, and their users. It is concerned only incidentally with the enormous quantity of copying that takes place elsewhere, outside libraries, often in multiple copies, by private persons, business enterprises, government agencies, and educational and eleemosynary institutions. Attention is here fixed on the copying practices of libraries and archives, and only certain kinds of libraries or archives, and their clients.

The short answer to the question of balance is that §108, together with the rest of the Copyright Act of 1976, provides a workable structural framework for obtaining a balance between creators' rights and users' needs. Considering the complexity of the issues, the intensity of the controversies, the scope of the interests, and the rapid changes in technology before and after enactment, that is a remarkable achievement. In certain instances, however, the balance has not been achieved in practice, either because the intent of Congress has not been carried out fully or because that intent is not clear to all the parties whose behavior lies within the ambit of the law. In some cases those deficiencies of the system in practice are serious. The threshold question, however, is: what

is the balance?

As a predicate for that answer, no quantification of "balance" is found in the statute. What is meant here by "balance" is whether §108, dealing with "reproduction by libraries and archives," allows users to use -- by means of copying -- works protected by copyright in a way both consistent with traditional principles of copyright law and library practice and not exceeding a minimal encroachment upon the rights of authors and copyright owners.

"Balance" can be seen in much of the evidence contained in the record upon which this report is based, and in the following broad statements based on that evidence:

- ° Between 1976 and 1980 library acquisition expenditures increased faster than the rate of inflation, with larger real increases in serial than in book expenditures.
- ° During the same period, the ratio of serial "births" to "deaths" was 3.4 to 1, and the real increase in serial publishers' revenues was between 40% and 50%.
- ° There is some indication that some types of photocopying in certain classes of libraries have increased very slowly or even decreased during that time.
- ° Most librarians appear to believe that because of these factors the present system strikes an appropriate balance.

Thus, some may surmise that all is well. There is, however, credible evidence that present conditions call this conclusion into doubt.

- ° Substantial quantities of the photocopies prepared by and for library patrons are made for job-related reasons, rather than for the type of private scholarship, study, or research most favored by the law.

- ° There appears to be significant confusion among many librarians about how the law works and why its enforcement is frequently their responsibility.
- ° Some publishers declare strongly that they believe the present system is seriously unbalanced. Their efforts, both in asserting their positions and in bringing lawsuits, demonstrate the seriousness of their concerns.

Elsewhere in this report appear a variety of proposals made by persons and organizations to attempt to rectify what they perceive to be the present system's shortcomings. After these recommendations and the entire record of review preceding this report have been carefully considered, the Copyright Office recommends that Congress enact legislation that would:

- 1) Encourage members of the proprietary, library, and commercial communities to join and take active parts in systems or organizations which facilitate the process of obtaining permission (with or without the payment of royalties) for the making of photocopies for which no specific legislative exemption applies;
- 2) Permit, under certain circumstances, the limited copying of music, for research but not for public performance, after prescribed permission-related steps have been taken; and
- 3) Clarify certain provisions in §108 about which there are clear disagreements among the parties and whose clarification would substantially reduce the levels of confusion, uncertainty, and acrimony which obtain today.

#### A. The Importance of Information

Information is no longer incidental, but central to the production of goods and services, our standard of living, our use of leisure, and our personal human development. Information is the organizing principle of the age, and its totem is not the smokestack but the computer. Creating, collecting, organizing, and distributing information has likewise become more central to our social organization and more expensive, absolutely and in relation to the gross national product.

In the past, these not insubstantial costs have been allocated by a traditional web of legal rights -- trade secrets, contracts, and, of course, copyright. Technology, at once the creature and creator of information, has seriously challenged continued reliance on traditional legal norms. Technology -- in the present case, photocopy machines -- has affected those legal control mechanisms and the system for allocating costs which they provide. Section 108 represents one of numerous efforts required to permit traditional use of copyrighted works and to maintain this market system.

As strenuous as this effort is, it will be as nothing compared to dealing with the complex rights and obligations arising from widespread introduction of "information" -- data or copyrighted works -- into computers. With the proliferation of computer-controlled electronic and electro-optical storage systems, increased reliance will be placed on exclusive contractual control over the use of information systems. If that becomes the major or the predominant legal framework governing information systems, limitations on dissemination could become the norm, and copyright with its idea-expression safety valve will be appreciated as a facilitator of information dissemination, not an obstacle to it.

#### B. The Philosophical Clash

Two things should be clear at the outset. First, all concerned -- authors, publishers, librarians, and library patrons -- agree that the efficient widespread dissemination of information is socially desirable. There is profound disagreement, rooted in a fundamental ideological clash between the library and proprietary communities, about how best to pursue this objective. It presents an issue which transcends the important issues of library copying dealt with in this report: how to pay for the creation,

collection, and distribution of information in the post-industrial Information Age.

The ideological split between the library community (which often speaks for its users as well as for itself) and the proprietary community can be described roughly in the following manner:

LIBRARY POSITION:

- Access to information is so essential that property rights affecting its transfer must be subordinated to the goal of free access;
- The costs imposed by these property rights (including copyright) are a barrier to information flow;
- Indeed, many do not accept the notion that there should be any legal rights in published information; and
- If economic rewards to the creators and distributors inhibit information flow, these rewards must be limited by the law and extended no further than absolutely indispensable.

PROPRIETARY POSITION:

- Copyright and other property rights in information facilitate rather than inhibit the efficient dissemination of published information through a free-market mechanism;
- As the Constitution intends, copyright rewards not only authors, but also disseminators who bring the works to the public and are thereby enabled to recover their costs and make an incentive profit;
- Copyright rewards are an essential component of the marketplace of ideas to which the First Amendment is directed.

Information products, however defined, will be created and disseminated only to the extent that one or more of the following four statements is true:

1. The creator is indifferent to cost considerations and donates the work to the public;
2. The creator receives a subsidy from the government or some other source;

3. The product's creator has the power to recover the costs of generating and disseminating the product plus a fair profit on the first sale of the product, thus leaving him or her unconcerned about uncontrolled later copying; or
4. The creator may spread his or her costs over multiple copies of the product by virtue of having some control over later copying and distribution.

The interests of creators and of disseminators, including publishers and other information suppliers, are always allied, but not always congruent. The author may not, in a given case, care about compensation; the publisher in every case must, or it is out of business.

Choices among these four models may be made both by Congress and individual authors and publishers. Each has its own economic and policy consequences. A few authors and proprietors choose the first from time to time, demonstrating that cost recovery and profits are not always the sole motivation for writing or publishing. The second amounts to a determination by a third party, the sponsor, that a work merits distribution without regard to consumer demand for it. The third obviously requires a high price for the first copy sold, and implies a complete lack of control over further copying. It occurs rarely. The fourth describes a properly functioning copyright system. In a market-based system, works perceived by the public to have value will bring economic returns to their creators; works for which no market develops may cost their creators dearly. In a system such as ours, where copyright plays a major role in the information marketplace, transactions of any of the four types may occur; if no copyright system exists, only the first three options are available.

The previously-listed "proprietary position" restates the copyright model. The "library position" seems to rely more on models one and two -- disinterest in income, or government or private subsidy -- and less on number four, inasmuch as property rights are to be subordinated if they conflict with dissemination.

The purpose in this analysis is straightforward: we are not here merely tinkering with legal rules. The Congress, the parties in consensual agreements, and anyone else who settles these rules, and thus governs conduct, is allocating costs of a central economic function which is rapidly becoming dominant in the society: the creation and dissemination of "information." That function is of great importance. Its cost is vast and growing. And the question of how that cost will be allocated looms over this entire debate.

On the one hand, the Congress must take into account the claims that user needs must override at least some authors' and disseminators' traditional rights. On the other hand, the Constitutional incentives of copyright and the reward of the gifted and the industrious must also be provided. And, the imperative of pluralism is so fundamental in authorship, as well as all forms of communication, that the First Amendment mandates scrupulous care in circumscribing legal rights in them.

One can look upon limitations on authors' rights, like those in §108 as part of a "social contract" for protecting legal rights of authors and copyright proprietors. Those limitations can also be viewed as a special burden on authors and copyright owners, beyond those that fall upon the public at large, to support public functions -- research, education, teaching -- whose cost should be borne by all. Curtailing authors' and proprietors' rights is not the only means of paying for information costs. Users can pay for their uses, and the costs can be further spread

over the public at large by taxes -- as are the costs of textbooks, school lunches, and library acquisitions. Librarians are, of course, apprehensive about contracting library resources and expanding public demand for information services.

We are here, in any event, ultimately concerned with allocation of some costs of a basic social function in the society -- dissemination of information.

### C. The Importance of Language.

In any discourse, the precise use of words controls whether real agreement, or clear disagreement, can be achieved. Two examples from the copyright photocopying controversy bear this out: the terms information and access.

First, information. In the post-industrial, "information" era, the proportion of most nations' gross national products comprised of the manufacture of goods will decline as the "service" proportion increases. Works in which copyright subsists may be the subject of transactions in either sector: books are goods; satellite transmissions are services. Copyrighted works are frequently contained in both, and copyright is essential to the economic health of their creators and disseminators.

"Information" is neither per se within nor without the scope of copyright. If, by information, one means one datum in a railroad timetable or the dates of the Wars of the Roses, then clearly copyright does not prevent the world at large from copying, using, and even selling such "information." If, on the other hand, one means a complete map or scholarly article, then these forms of information are protected by copyright, and may generally be copied only with the permission of the copyright owner. In the rush to exalt information as a preferred commodity of a special and different kind, these distinctions are sometimes overlooked.



Works protected by copyright may be "used," of course, in the traditional sense that any person, including a library patron, may read them, take notes from them, and employ the information derived from them in private pursuits. This use is the subject of another important word: access. The tradition of providing free access to information (and to the copyrighted works which embody that information) has long been a keystone in American libraries. Before the advent of low-cost photocopying machines, access almost always meant placing a published copy of a printed work in the hands of the library user. This type of access, of course, caused no copyright problems.

Now, however, it is possible to provide many patrons with simultaneous access to the same material if photocopies are made in sufficient quantities. Soon it will be technologically possible for many patrons at many sites to have simultaneous access to one copy of a work stored on an optical disc. When it is suggested that photocopy machines and electro-optical disc technology pose copyright problems, a sometimes-heard response is "I would hate to see copyright get in the way of access to information."

Copyright cannot deny access to information. All library patrons may have access, in the traditional sense, to works in libraries' collections and to the information therein. But copyright does often affect how convenient or inconvenient, how cheap or expensive, that access may be if the chosen mode of access is copying -- and that cost is not merely the cost of creating the copy, but also of creating the work. Access and copying are not synonymous. Section 108 is an effort to allocate the cost of copying with maximum social benefit.

#### D. Nature of Report Conclusions

This report reaches conclusions of various kinds. In coming to them, the Copyright Office has in all cases stated the positions of

interests, witnesses, and commentators, the better to define the issues.

In those cases where the Copyright Office believes that the law, and the interpretation of its meaning, are clear, the report says so. In other cases, this report offers an interpretation not in the conviction of rightness, but as a preferred construction which will at least focus and inform subsequent debate. In still other cases, the Copyright Office does not know what meaning was intended, and suggests possible clarification.

#### E. The Process: Past and Future

This report addresses issues which are current. To the extent possible, it attempts to identify issues which are likely to arise. The process of resolving outstanding photocopying issues, to say nothing of other emerging copyright-information issues, will never be settled once and for all. We have entered a period of perpetual change in communications and information technologies, and need to provide a process for coming to terms with it continuously.

As to the present, one of the more disappointing developments concerning photocopying has been the absence, for whatever reasons, of the type of dispute-resolving (or at least dispute-reducing) discussions which led, in the period just prior to revision, to the classroom guidelines, the music guidelines, and the CONTU guidelines. Each of these sets of guidelines reduced the level of uncertainty in §§107 and 108. Since 1976, the only productive discussions of which the Copyright Office is aware concerned certain off-air videotaping by and for educational institutions and the photocopying of "serious" music in music libraries for research purposes. The "off-air" negotiations were the direct result of a comment in the legislative history of the 1976 Copyright Act and a hearing on the subject held in 1979; the music discussions -- which led to the proposal set out and endorsed in this report -- were initiated by the Music Library Association.

Beginning in January, 1982, a number of proprietary and library representatives met several times at the Copyright Office to discuss various "problem areas" concerning photocopying and other technology-copyright issues. Disagreement was dominant and unrelieved. The conferees disagreed about whether certain issues were "problems" at all. No agreements were reached.

The Copyright Office believes that Congress intended that the parties work together, as in the "revision" process, to reach a common ground. If they are to do so, any issue considered to be a problem by either side must be treated as such. It is perhaps still possible that the parties -- rather than the courts -- may fill in the gaps in the law concerning library photocopying. But, in the absence of a clear signal, from Congress or elsewhere, that such work is needed, the results of the 1982 meetings offer little evidence that this is so.

With respect to the future, history shows that predictions of technological developments, and when they will arrive, are hazardous. Because electro-optical systems, direct broadcast satellites, and a vastly increased microcomputer population are here, good faith discussions about how proprietary rights and the needs of users will be balanced with respect to those technologies should be undertaken. If they are, and if present problems are addressed in an environment conducive to settling, rather than reemphasizing disputes, then all concerned will be well served. The Copyright Office hopes this report will help.



## II. BACKGROUND AND LEGISLATIVE HISTORY OF SECTION 108, THE LIBRARY PHOTOCOPYING PROVISION

The legal issues upon which librarians and publishers are divided are rooted both in the development of library photocopying and in the lengthy revision process during which §108 was written. Sixty-seven years passed between the 1909 and 1976 Acts. Repeatedly, courts and the Congress witnessed technological advancements which made it necessary to consider uses of copyrighted material dimly considered, if at all, by the drafters of the 1909 Act. Yet, reprographic reproduction -- what we loosely call photocopying -- grew up regulated by custom more than case law, by cautious arrangements more than statutory norms. As the technological capabilities for rapid, inexpensive reproduction of published material expanded, uncompensated photocopying by users in libraries escalated. And copyright proprietors voiced their concern. Library copying was discussed first in the 1930's, as photoduplicating equipment was being introduced, noted in the Copyright Revision studies of the late 50's and early 60's, and became a hotly debated topic during the final period of the copyright revision.

The evolution of §108 was turbulent. Technological advances continued to be made; interest groups formed; and Congress, the Copyright Office, and the courts all explored ways to deal with library photocopying in order to balance the needs of proprietors and users. Inevitably, different drafts of the revision bill reflected various attitudes, positions, and arguments of these groups, often developed as responses to emerging events while revision of the whole copyright law moved forward. These

drafts reflect, of course, not only the views of the contending interests, but also those of Congress and the Copyright Office, as well as judicial interpretations occurring in the course of legislative revision.

A. Copyright Practices 1909-1960.

1. 1909 Copyright Law.

As discussion of a library photocopying exemption progressed, it was usually linked to the doctrine of fair use.<sup>1/</sup> The 1909 Act contained neither explicit provisions dealing with the doctrine of "fair use" nor particular provisions concerning library photocopying. Fair use, however, had been a significant defense in copyright infringement for many years, and the technological predecessors of photocopying had caused concern within the copyright community since the 1930's.<sup>2/</sup> If a situation had earlier arisen testing library photoduplication, a central question -- probably the central question -- would have been whether the reproduction was a fair use.

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1. The elements which go into a determination of whether a given unauthorized use of copyrighted material is a "fair use" and not therefore infringing were developed by courts in the course of litigation. The 1976 Copyright Act contains the first statutory expression of the fair use doctrine in our copyright laws. That provision will be discussed, infra, at IV A(2). For the moment it is enough to note a definition of fair use which well-captures the objective and approach of that doctrine, in the past and now: "Fair use may be defined as a privilege in others than the owner of copyright, to use the copyrighted material in a reasonable manner without his consent; notwithstanding the monopoly granted to the owner by the copyright." Ball, The Law of Copyright & Literary Property 260 (1944).
  2. For a more detailed examination, see Latman, Fair Use of Copyrighted Works, Study No. 14, and Varmer, Photoduplication of Copyrighted Material by Libraries, Study No. 15, in Copyright Rev. Studies.

## 2. "Gentlemen's Agreement" of 1935.

Prior to the advent of machine copiers, manual copying of library materials was both time-consuming and tedious. Consequently most researchers necessarily avoided extensive copying. Twentieth-century technology made exact ("facsimile") reproduction simple, quick, and cheap. Even before the development of modern photocopiers, copyright proprietors were concerned about librarians furnishing photographic reproductions of copyrighted materials to users, as from wet-process copying. In the 1930's, controversy over the issue led to negotiations between librarians and publishers.<sup>3/</sup> The result was the 1935 "Gentlemen's Agreement." This agreement permitted a library to make a single copy of part of a work for a scholar to use in research.<sup>4/</sup> Although the "Gentlemen's Agreement" had no binding effect, it served as a standard of acceptable conduct governing library copying for many years.

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3. The agreement was negotiated between the National Association of Book Publishers and a Joint Committee on Materials for Research of the American Council of Learned Societies and the Social Science Research Council.

4. A library, archives office, museum, or similar institution owning books or periodical volumes in which copyright still subsists may make and deliver a single photographic reproduction or reduction of a part thereof to a scholar representing in writing that he desires such reproduction in lieu of loan of such publication or in place of manual transcription and solely for the purpose of research; provided —

- (1) That the person receiving it is given due notice in writing that he is not exempt from liability to the copyright proprietor for any infringement of copyright by misuse of the reproduction constituting an infringement under the copyright law;
- (2) That such reproduction is made and furnished without profit to itself by the institution making it.

Study No. 15, supra note 1 at 57. See, 2 J. Of Doc. Reproduction 31 (1939) for the complete text of the "Gentlemen's Agreement."

Some echoes of the seeds of the present §108 can be found in the 1935 Agreement. But §108 is more than a mere reworking of the "Gentlemen's Agreement." Obviously, things have changed since 1935, both for publishers and libraries. Users, and their uses, have changed even more profoundly. Scientific, technical, medical and other specialized user groups increased enormously in number, both in schools and the marketplace; so also have the scope and importance of information and information products in education, commerce, research, and leisure. Concomitantly the increased demands for rapid, low-cost, comprehensive availability of needed information have fallen heavily on both publishers and libraries.

The 1935 Agreement, for example, does not purport to deal with a central issue — interlibrary loan. The approach of the 1935 Agreement is toward a limited copying arrangement enjoyed by libraries by virtue of their ownership of the physical materials from which they copy for users. The era of national and regional bibliographic data bases, huge populations of students and specialized researchers, coordinated collection development and "ILL" then lay in the future and, of course, was not provided for.

B. Technological Advancements Magnify Photocopying Problem --  
Revision Efforts 1960-1965

1. Copyright Revision Studies and Register's Report.

Although earlier Congresses had from time to time attempted to revise the 1909 Copyright Act, the effort that resulted in comprehensive revision by the 1976 Act began with the publication, during the late 1950's and early 1960's, of a series of studies on copyright law and practice organized by the Copyright Office at the behest of the Congress. Several of these studies dealt with fair use and photoduplication.



In this series, a study of library photoduplication by Borge Varmer noted that the "various methods of photocopying have become indispensable to persons engaged in research and scholarship, and to libraries that provide research material...."<sup>5/</sup> Varmer also noted that legal justification for photocopying was often posited upon one of two aspects of fair use: (1) making copies for the sole purpose of reference, study, and scholarship; (2) reproduction in the researcher's writing by quotation or reference to the writings of others.<sup>6/</sup>

These two approaches differ in concept: the former approaches the question of a researcher's liability from the basis of a "right" of private or personal reproduction, which can exist as an inherent limitation on the right of reproduction itself.<sup>7/</sup> The latter extrapolates to a research setting the judicially acknowledged right to quote reasonable portions of a protected work.

The former notion has not found broad acceptance in world copyright law,<sup>8/</sup> and it has been questioned in recent litigation.<sup>9/</sup> Debate over the second approach has been fierce and convoluted, necessarily

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5. Id. at 49.

6. Id.

7. In Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl., 1973), aff'd by an equally divided court, 420 U.S. 376 (1975), the Court of Claims' refusal to accord the term "copy" in §7(a) of the 1909 copyright law its literal meaning pointed rather clearly toward a theory of a "personal reproduction right" inherent the 1909 law's treatment of the author's reproduction, publication and distribution rights. Whatever merit this argument may have had, it is not a valid proposition under the 1976 Copyright Act.

8. See Ficsor, "The Home Taping of Protected Works: An Acid Test for Copyright, WIPO Copyright 59 (February 1981).

9. Universal City Studios, Inc. v. Sony Corporation of America, 480 F. Supp. (C.D. Ca. 1979), rev'd 659 F.2d 963 (9th Cir. 1981), cert. granted, June 14, 1982, 50 U.S.L.W. 3973.

centering upon how far one can analogize to photocopying the acknowledged right of one author to quote another in his or her writings.

After summing up the problems caused by technological advances and suggesting possible solutions, the Varmer study suggested that a royalty arrangement appeared to be the best solution for multiple, corporate, copying; no preference was expressed among the choices of a statutory license, a voluntary licensing arrangement, or a "code of practices."<sup>10/</sup> But the study did say that limitations should be placed on library photocopying, in the following manner:

1. One copy permitted.
2. Non-profit purpose.
3. Reasonable portion of work, unless the work is no longer available from the publisher.
4. Copyright notice be duplicated on the copy.
5. Required statement from requestor that (a) the copy is for private research, and (b) if the entire work is requested, inquiry has been made, and the publisher cannot supply a copy.<sup>11/</sup>

In 1961, the Report of the Register on copyright law revision was publicly released. In that report, the Register acknowledged

The application of the principle of fair use to the making of a photocopy by a library for the use of a person engaged in research is an important question which merits special consideration. This question has not been decided by the courts, and it is uncertain how far a library may go in supplying a photocopy of copyrighted material in its collections. Many libraries and researchers feel that this uncertainty has hampered research and should be resolved to permit the making of photocopies for research purposes to the fullest extent compatible with the interests of copyright owners.<sup>12/</sup>

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<sup>10/</sup> Study No. 15, supra note 1, at 62-67.

<sup>11/</sup> Study No. 15, supra note 1, at 63.

<sup>12/</sup> 1961 Register's Report at 25.

The recommendations and policy preferences of the 1961 Report are of interest not merely as a milestone but also because they became the subject of controversy. The Register's approach to a solution in 1961 and his recommendation are worth setting down here:

As a general premise, we believe that photocopying should not be permitted where it would compete with the publisher's market. Thus, when a researcher wants the whole of a publication, and a publisher's copy is available, he should be expected to procure such a copy.

In situations where it would not be likely to compete with the publisher's market, however, we believe that a library should be permitted to supply a single photocopy of material in its collections for use in research. Thus, when a researcher wants only a relatively small part of a publication, or when the work is out of print, supplying him with a single photocopy would not seriously prejudice the interests of the copyright owner. A number of foreign laws permit libraries to supply single photocopies in these circumstances.

The statute should permit a library, whose collections are available to the public without charge, to supply a single photocopy of copyrighted material in its collections to any applicant under [conditions the Register then enumerated] ...<sup>13/</sup>

These conditions found expression in the first draft of the revision bill.<sup>14/</sup> The Register also expressed a preference for contractual royalty arrangements as the best way to cover multiple "corporate" copying.<sup>15/</sup>

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13. Id. at 25-26.

14. See, text infra, 2 The Preliminary Draft.

15. Id. at 26.

## 2. The Preliminary Draft.

As appeared in the discussion following the Register's Report, some commentators favored omitting both a general fair use and specific photocopying sections from the proposed new statute;<sup>16/</sup> however, the preliminary draft of a new copyright law contained both. Section 7 permitted libraries to make a single copy under certain conditions:

- (a) The library shall be entitled, without further investigation, to supply a copy of no more than one article or other contribution to a copyrighted collection or periodical issue, or to supply a copy or sound recording of a similarly small part of any other copyrighted work.
- (b) The library shall be entitled to supply a copy or sound recording of an entire work, or of more than a relatively small part of it, if the library has first determined, on the basis of a reasonable investigation that a copy or sound recording of the copyrighted work cannot readily be obtained from trade sources.
- (c) The library shall attach to the copy a warning that the work appears to be copyrighted.<sup>17/</sup>

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16. Copyright Law Rev., Part 2, at 24-31, 84.

17. Copyright Law Rev., Part 3, at 6. Section 6, the fair use provision stated:

All of the exclusive rights specified in section 5 shall be limited by the privilege of making fair use of a copyrighted work. In determining whether, under the circumstances in any particular case, the use of a copyrighted work constitutes a fair use rather than an infringement of copyright, the following factors, among others, shall be considered: (a) the purpose and character of the use, (b) the nature of the copyrighted work, (c) the amount and substantiality of the material used in relation to the copyrighted work as a whole, and (d) the effect of the use upon the potential value of the copyrighted work.

Id.

### 3. Selection of Photocopying Provision.

Discussion of the preliminary draft bill began January 16, 1963. Although its section 7 attempted to balance users' needs and proprietors' interests, neither group favored the exemption.<sup>18/</sup> The opposition to this proposal was unexpectedly strong, and moved drafters to exclude a photocopying exemption from the 1964 and 1965 revision bills. The reaction was summed up by the Register in the 1965 Supplementary Report on Copyright Law Revision:

In a way the comments on section 7 of the preliminary draft represented an interesting case study. Opposition to the provision was equally strong on both sides but for exactly opposite reasons, with one side arguing that the provision would permit things that are illegal now and the other side maintaining that it would prevent things that are legal now. Both agreed on one thing: that the section should be dropped entirely. We also became convinced that the provision would be a mistake in any event. At the present time the practices, techniques, and devices for reproducing visual images and sound and for "storing" and "retrieving" information are in such a stage of rapid evolution that any specific statutory provision would be likely to prove inadequate, if not unfair or dangerous, in the not too distant future. As important as it is, library copying is only one aspect of the much larger problem of changing technology, and we feel the statute should deal with it in terms of broad fundamental concepts that can be adapted to future developments.<sup>19/</sup>

Although the photocopying provision had been eliminated, the issue nevertheless was still being considered behind-the-scenes and in Copyright Office-sponsored discussions. These discussions revealed a widening schism among librarians, educators, and proprietors on the general

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<sup>18.</sup> See, e.g., Copyright Law Rev., Part 3, at 159, 160, 176, 337, 371-3, 376, 400, 409, 413, 418, 437, 442-3. See also, Copyright Law Rev., Part 4, at 273, 316-19, 380, 396.

<sup>19.</sup> Supp. Rep. at 26.

question of library photocopying and on the more specific question of whether fair use covered it. Some commentators felt that photocopying could be treated under fair use;<sup>20/</sup> others urged that the two were separate.<sup>21/</sup> One commentator observed that library photocopying "is not a mere question of 'fair use' since it involves 'Chinese copying' of complete works."<sup>22/</sup>

Publishers argued that there were no judicial decisions concerning the application of fair use to library photocopying, and that any statute should be drawn narrowly since technology was changing.<sup>23/</sup> Users wanted either a generous photocopying provision which legitimized existing practices (and confirmed their legal basis), or a general fair use provision with specific reference to library photocopying.

The widening disagreement between users and proprietors can be seen in a particular dialogue that occurred in discussion of the 1964 revision bill. As noted earlier, that bill did not contain any analog to §108. Photocopying, like educational uses, was subsumed under the doctrine of fair use, expressly included in section 6 of the bill. And, as the Register observed, "the decision to drop any provision on photocopying tended to increase the importance attached to including a general section

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20. For example, the National Audiovisual Association endorsed a proposal to eliminate the photocopying provision and leave the problems for the courts to determine under fair use. Copyright Law Rev., Part 4 at 396. See also Copyright Law Rev., Part 3, at 160 (statement of John Schulman); Part 2, at 303 (statement of Harry G. Henn).

21. See Copyright Law Rev., Part 3, at 176 (statement of Leon Kellman).

22. Copyright Law Rev., Part 2, at 403 (statement of John F. Whicher).

23. See generally, Copyright Law Rev., Part 4, at 251, 254-5 (statement of American Book Publishers Council; at 300 (statement of the American Psychological Association).

on fair use in the statute."<sup>24</sup>/ Since section 6 was intended to clarify and restate fair use and not to create a new sort of exemption, library representatives sought some assurance that statutorily recognized fair use would permit present photocopying services to patrons to continue, exempt from copyright liability. Charles F. Gosnell of the American Library Association remarked:

The American Library Association has taken a very strong position on the matter of fair use....

I do have a question about it, though: whether it actually is as wide as the practice has been in the past. I certainly assume that it covers photocopying as it is practiced and advocated by the library people in their statement on the doctrine of fair use. I would suggest, however, the addition of two other criteria. One, which is particularly important to libraries is that of availability. Nowhere have I heard in these various meetings any statement of assumption of responsibility on the part of publishers and others of responsibility of keeping their material available -- both keeping books in print and keeping them so that they can be ordered on reasonably short notice. We do know that there is great difficulty in obtaining material, and some of it, of course, becomes unavailable.

Irwin Karp, of The Authors League, replied:

Just so that somebody doesn't go picking over the record of these proceedings ten years hence and find that Mr. Gosnell's statement went unchallenged, let me point out that his assumptions about the relationship of fair use to photocopying are entirely gratuitous and completely erroneous. Fair use doesn't cover photocopying, and I don't think that any court would hold that it did. Certainly those of us who were opposed to the photocopying section in the earlier draft do not assume for a moment that this section on fair use by any means permits the types of activities that were covered by that section.

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<sup>24</sup>. Copyright Law Rev., Part 2, at 403 (statement of John F. Whicher).

... all of this discussion simply indicates that the doctrine of fair use is much better left to the courts, who have administered it fairly and intelligently and with all of the flexibility that proceedings in courts permit.<sup>25/</sup>

The crux of the discussion on photocopying as a subspecies of the general doctrine of fair use is encompassed within the brief colloquy between Messrs. Gosnell and Karp. In retrospect, ALA's acceptance of a general fair use treatment of photocopying is seen as based on the belief that a confirmation of the doctrine would settle the legitimacy of one-to-a-customer photocopying for researchers. The Authors League made clear, however, that statutory confirmation of the doctrine of fair use would not do that; it simply left the issue for ad hoc resolution by the courts.

The conundrum that appeared to form after 1964 was this: throwing the library photocopying issue to the law of fair use would not, by itself, provide the legal security librarians sought. Yet agreement on a specific exemption had already proved elusive. Publishers and authors, who once saw the principal issues as multiple and non-commercial copying, had come to perceive inherent dangers to their exclusive rights from combining the "single copy" exemption with modern reprographic techniques.

The Register of Copyrights noted that the decision to drop the photocopying provision from the 1964 Revision Bill tended to increase the importance of fair use and called for a more detailed fair use provision.<sup>26/</sup> Nevertheless, the 1965 Revision Bill contained no photocopying provision

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25. Copyright Law Rev., Part 5, at 103.

26. Copyright L. Rev., Part 6, at 26-7.



and only a very general fair use provision,<sup>27/</sup> since agreement could not be reached among publishers, authors, educators, and librarians. The Register nonetheless adhered to his recommendation to incorporate a general fair use section in the statute.<sup>28/</sup>

C. The Effort to Devise A Limited Exemption: 1966-76.

In the period 1965-1976 repeated amendments were offered to add photocopying provisions to copyright revision bills being considered by Congress. Proprietors maintained support for a general statutory restatement of fair use, leaving all questions of specific application, such as photocopying, to the courts. Librarians, however, now revised their earlier position and sought either a specific library photocopying exemption or a fair use provision containing express language to cover photocopying.

As early as 1966, the House Committee on the Judiciary noted that past efforts to come to reasonable arrangements on library copying had failed and urged "all concerned to resume their efforts to reach an accommodation under which the needs of scholarship and the rights of authors would both be respected."<sup>29/</sup> Repeatedly, the Legislature called upon the affected interests to find a consensual solution to the photocopying issue. Although little in the way of concrete consensus proposals emerged in 1966-73, there is no doubt that, in fits and starts, a difficult dialog proceeded between the library and proprietary communities. And, through to

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27. Copyright Law Rev., Part 5, see Comparative Table, App. B, at 192-3.

28. Id. at 25-6.

29. H.R. Rep. No. 2237 at 65.

1973, various technical questions were thereby resolved, producing new, relatively non-controversial subsections to a photocopying provision which appeared in the 1967 revision bill.

But the core controversy — first revealed in the 1963-64 panel discussions — remained untouched by compromise: the crucial question of one-to-a customer single copying by libraries. Library representatives stressed that single copying for random patrons had been a long-standing service, had become of increased importance to modern scholarship and education, and that under no circumstances could the communities served by libraries accept a legislative solution which hobbled these traditional services, or barred their modernization.

Proprietors, wary of the impact of the new technological environment in which single copying now occurred, were equally forceful and adamant. Single, one-to-a customer copying, projected nationally across all libraries, and available to huge numbers of people at fairly low cost, was qualitatively a different terrain from the days of the 1935 Gentlemen's Agreement. Recalling that books and periodicals are generally sold one-to-a customer, publishers believed that a single copying privilege, unrestricted, would lead to the creation of a massive secondary publishing network, outside commercial controls and without remuneration to copyright owners. Under such an exemption, publishers would have a firm reproduction right only for first publication; subsidiary marketing of information and literature would be compromised by the "competition" from unauthorized copying.

But, if all the parties before Congress could not reach an agreement, some were willing to develop other fora to thrash out the issues.

The debates between 1968 and 1976 over single-copy photoreproduction privileges, were influenced by three developments: the formation of the Commission on New Technological Uses of Copyrighted Works in 1973, the Conference on the Resolution of Copyright Issues in 1974, and the case of Williams & Wilkins v. U.S., filed in 1968 and finally closed in 1975.<sup>30/</sup>

Of these developments, the most important was, without doubt, Williams & Wilkins. The course of the litigation -- its major events, their sequence and their relation in time to the course of copyright law revision -- was as important as its final result. In large measure, after the case was filed, Congressional and private debates looking to a statutory exemption for library photocopying tended to be shaped by where that litigation stood at a given time. By providing, as it were, a full-dress rehearsal of how fair use legal principles might apply to library photocopying, this litigation exposed, both to libraries and copyright owners, hazards and uncertainties in applying that doctrine. Additionally, many of the key concepts later written into §108 -- particularly § 108(g) -- were first considered in a disciplined way in the course of Williams & Wilkins.

1. Williams and Wilkins' effect on the library photocopying issue.

By the early 1960's, when revision of the copyright law began, many court decisions had interpreted fair use but none had tested whether this defense was available in an infringement action involving library photocopying.

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<sup>30</sup>. Williams & Wilkins Co. v. United States, 172 U.S.P.Q. 670 (Comm'r Ct. Cl. 1972), rev'd 487 F.2d 1345, 1363 (Ct. Cl. 1973), aff'd by an equally divided court, 420 U.S. 376 (1975).

In the absence of such authoritative judicial decisions, librarians insisted that unregulated, uncompensated photocopying was precisely the sort of use which fair use was intended to free from copyright controls: it was in aid of education and scholarship, it did not appear to conflict with significant post-first-publication markets of commercial publishers, it produced no profit to the library, and its availability was essential to permit scholars to have reasonable, economical, ways of obtaining the particular from the mass of published works comprising much of the so-called "information explosion."

By the same token, publishers also pressed their point of view: whatever practices were sanctioned under the Gentleman's Agreement of 1935, they were not in recognition of fair use; that doctrine simply did not apply to the large-scale, high-speed, cheap photocopying of the late 60's and early 1970's.

As the discussions grew acrimonious, the issue was cast by librarians in terms of whether "fair use photocopying" would be preserved in the new copyright law. And the bombshell which exploded with the filing of the Williams & Wilkins case drew its force from the fact that it threw into question the propriety of asserting that single copying for library patrons was ever a part of the existing doctrine of fair use. Williams & Wilkins in that lawsuit charged the National Library of Medicine and NIH with infringing its copyrights in certain medical journals, by making unauthorized photocopies of articles from such journals on behalf of users of NLM and patrons of other libraries receiving photocopies under inter-library loan arrangements. The case was first tried before a Commissioner of the Court of Claims, who found for plaintiff.<sup>31/</sup>

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<sup>31</sup>. 172 U.S.P.Q. 670 (Comm'r Ct. Cl. 1972).

The implications of Commissioner Davis' ruling for the copyright revision program were considerable. NLM's photocopying services were broadly serving both local and national patronage. As the Commissioner observed:

[A]s an integral part of its operation, the library runs a photocopy service for the benefit of its research staff.... the library does not monitor the reason for requests or the use to which the photocopies are put. The photocopies are not returned to the library; and the record shows that, in most instances, researchers keep them in their private files for future reference.

and,

NLM is in essence a "librarians' library." As part of its operation, NLM cooperates with other libraries and like research-and education-oriented institutions (both public and private) in a so-called "interlibrary loan" program. Upon request, NLM will loan to such institutions, for a limited time, books and other materials in its collection. In the case of journals, the "loans" usually take the form of photocopies of journal articles which are supplied by NLM free of charge and on a no-return basis. The term "loan" therefore is a euphemism when journal articles are involved. NLM's loan policies are fashioned after the General Interlibrary Loan Code, which is a statement of self-imposed regulations to be followed by all libraries which cooperate in interlibrary loaning.<sup>32/</sup>

Of the five defenses raised by the Government in that case, that of fair use was crucial for copyright policy. On that, Commissioner Davis was careful, but unequivocal:

Whatever may be the bounds of "fair use" as defined and applied by the courts, defendant is clearly outside those bounds. Defendant's photocopying is wholesale copying and meets none of the criteria for "fair use." The photocopies are exact duplicates of the original articles; are intended to be substitutes for, and serve the same purpose as, the original articles; and serve to diminish plaintiff's potential market for the original articles since the photocopies are made at the request of, and for the benefit of, the very persons who constitute plaintiff's market. Defendant says, nevertheless, that plaintiff has failed to show that it

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32. Id. at 673.

has been harmed by unauthorized photocopying; and that, in fact, plaintiff's journal subscriptions have increased steadily over the last decade. Plaintiff need not prove actual damages to make out its case for infringement....<sup>33/</sup> (citation omitted).

Commissioner Davis went further, meeting head-on the question of the status to be accorded long-standard practices heretofore justified upon the 1935 Gentlemen's Agreement:

The "gentlemen's agreement" does not have, nor has it ever had, the force of law with respect to what constitutes copyright infringement or "fair use." So far as this record shows, the "agreement" has never been involved in any judicial proceedings. Nevertheless, the "agreement" is entitled to consideration as a guide to what book publishers and libraries considered to be "reasonable and customary" photocopying practices in the year 1935. It has little significance, however, to this case.... Furthermore, the "agreement" was drafted at a time when photocopying was relatively expensive and cumbersome; was used relatively little as a means of duplication and dissemination; and posed no substantial threat to the potential market for copyrighted works. Beginning about 1960, photocopying changed character. The introduction to the marketplace of the office copying machine made photocopying rapid, cheap and readily available. The legitimate interests of copyright owners must, accordingly, be measured against the changed realities of technology.<sup>34/</sup>

With Commissioner Davis' opinion, the following propositions gained a considerable, if ephemeral, legitimacy:

- The avoidance of multiple copying for particular requesters is not enough for non-commercial libraries to avoid copyright liability. Single copy transactions, cumulatively, are equivalent to "wholesale" copying and could not fit into the traditional contours of "fair use";
- The "customary privilege" of hand-copying or quotation, memorialized in the 1935 Gentlemen's Agreement, does not reflect the law on the subject and cannot be relied upon by libraries in justification of large-scale, "high-tech" photocopying services.

33. Id. at 679.

34. Id. at 680-1 (emphasis added).

The impact of the opinion on the library communities was considerable. Section 108(d)(1) of S. 1361, introduced in 1973, provided library photocopying privileges only where "an unused copy cannot be obtained at a normal price from commonly-known trade sources, in the United States, including authorized reproducing services." With Commissioner Davis' opinion on the table, library representatives proposed a further amendment in direct response to his ruling. That amendment would have provided an unqualified confirmation of what libraries had insisted all along was the law: single copying of articles for as many patrons as appeared without reference to availability of the same materials from commercial channels. Only with respect to entire works would the library reproduction privilege be conditioned on the unavailability of a copy from trade sources.<sup>35/</sup>

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35. Substitute for section 108(d) the following:

(d) The rights of reproduction and distribution under this section apply to a copy of a work, other than a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work, made at the request of a user of the collections of the library or archives, including a user who makes his request through another library or archives, but only under the following conditions:

(1) The library or archives shall be entitled, without further investigation, to supply a copy of no more than one article or other contribution to a copyrighted collection or periodical issue, or to supply a copy or phonorecord of a similarly small part of any other copyrighted work.

(2) The library or archives shall be entitled to supply a copy or phonorecord of an entire work, or of more than a relatively small part of it, if the library or archives has first determined, on the basis of a reasonable investigation that a copy or phonorecord of the copyrighted work cannot readily be obtained from trade sources.

(3) The library or archives shall attach to the copy a warning that the work appears to be copyrighted.

and renumber section 108(d)(2) to make it 108(d)(4).

1973 Sen. Hearings at 89.

That this amendment was prompted by Commissioner Davis' opinion is beyond doubt. As said by the spokesman for ARL, Dr. Steven A. McCarthy:

The purpose of the proposed amendment is to insure by specific legislative language that a customary, long established library service of providing a photocopy for a reader who requests it may be continued without infringement of copyright. Adoption of the amendment would remove the threat of suit against libraries arising out of varying judicial interpretations of what is or is not fair use. At the same time this amendment would assure libraries, which are public service agencies largely supported by public funds, that they can and should employ modern technology and methods in serving their readers. It should be emphasized further that this amendment does not seek to encourage or develop a new service. Instead, it seeks to assure beyond doubt or question the legality of a traditional service which was not challenged for two generations under the 1909 Copyright Law until a suit was brought by the Williams and Wilkins Co. against the National Library of Medicine several years ago.

The opinion of Commissioner Davis of the U. S. Court of Claims in the Williams and Wilkins case brings into question the fair use doctrine as applied to library photocopying....In view of this opinion it is apparent that fair use can no longer be considered adequate assurance for the continuation of customary library services.<sup>36/</sup>

As will later become apparent, the librarians' amendment proposed in 1973 became the precursor for present §108(d) and (e). However, it will also become clear that Congressional acceptance of this proposal was accompanied by the provisions of §108(g)(2). Why this "package deal" was crafted, initially in the Senate, can also be answered by reference to the unfolding Williams & Wilkins litigation.

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<sup>36</sup>. 1973 Hearings at 89-90.



On November 27, 1973, the full Court of Claims handed down its decision in Williams & Wilkins.<sup>37/</sup> By a 4-3 vote, the Court reversed Commissioner Davis' holding and found NLM's practices at issue to constitute a fair use. Judge Oscar Davis, writing for the majority, stressed that the court's ruling was narrow:

Connected with this point is the second one that our holding is restricted to the type and context of use by NIH and NLM, as shown by this record. That is all we have before us, and we do not pass on dissimilar systems or uses of copyrighted materials by other institutions or enterprises, or in other fields, or as applied to items other than journal articles, or with other significant variables.... Especially since we believe, as stressed infra, that the problem of photo and mechanical reproduction calls for legislative guidance and legislative treatment, we feel a strong need to obey the canon of judicial parsimony, being stingy rather than expansive in the reach of our holding.<sup>38/</sup>

Chief Judge Cowen, in dissent, viewed the controversy as Commissioner Davis had:

[T]his is not a case involving copying of copyrighted material by a scholar or his secretary in aid of his research, nor is it a case where a teacher has reproduced such material for distribution to his class.... What we have before us is a case of wholesale, machine copying, and distribution of copyrighted material by defendant's libraries on a scale so vast that it dwarfs the output of many small publishing companies.... As the trial judge correctly observed, this extensive operation is not only a copying of the copyrighted articles, it is also a reprinting by modern methods and publication by a very wide distribution to requesters and users.<sup>39/</sup>

It remained, however, for Judge Nichols, also dissenting, to capture in a pointed phrase, the anxieties of the minority:

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37. 487 F.2d 1345 (Ct. Cl. 1973).

38. Id. at 1362.

39. Id. at 1364.

... I have difficulty regarding a use as fair, when a user benefits as extensively from the copyrighted material as this one does, yet adamantly refuses to make any contribution to defray the publisher's cost, or compensate for the author's effort and expertise, except the nominal subscription price of two copies of each periodical.... However hedged, the decision will be read, that a copyright holder has no rights a library is bound to respect. We are making the Dred Scott decision of copyright law.<sup>40</sup>/

The majority and minority in Williams & Wilkins did agree that Congress could and should act to resolve the photocopying question. Loath to preempt the legislative functions, the majority and the dissenters in the Court of Claims made candidly clear the extent to which their very different positions were reached out of what can only be called fear: the majority's fear of hampering medical science and delivery of vital health services; the minority's fear of unleashing a broad exemption damaging to the commercial infrastructure of scientific and medical communications. Both felt that Congress could step in.

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<sup>40</sup>. Id. at 1387.

Although the impact of both Williams & Wilkins opinions was great, the case has had no significant effect on later copying cases.<sup>41/</sup> So far, the two major cases involving similar copyright issues have failed to follow Williams & Wilkins. In Universal City Studios, Inc. v. Sony Corporation of America,<sup>42/</sup> [hereafter Betamax] the district court cited Williams & Wilkins in a discussion of whether a use is fair but noted that the case, "affirmed by an evenly divided Supreme Court, has little precedential value."<sup>43/</sup> The Court of Appeals in Betamax reversed the trial court and

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41. Of the cases citing Williams & Wilkins from 1975-1982, six do so in determining whether there has been fair use through assessment of the four factors to be considered: Meeropol v. Nizer, 560 F.2d 1061, 1069 (2d Cir. 1976), aff'g in pt, rev'g in pt, and remanding, 417 F. Supp. 1201, 1206 (S.D.N.Y. 1976); D.C. Comics, Inc. v. Reel Fantasy, Inc., 539 F. Supp. 33, 37 (S.D. Tex. 1978); Keep Thomson Governor Committee v. Citizens for Gallen Comm., 457 F. Supp. 957, 961 (D. N.H. 1978); Italian Book Corp. v. American Broadcasting Companies, Inc., 458 F. Supp. 65, 69 (S.D.N.Y. 1978); National Conference of Bar Examiners v. Multistate Legal Studies, 212 U.S.P.Q. 486 (N.D. Ill. 1981).

Four other cases cite Williams & Wilkins in a discussion of the amount of the work taken; two observe that the copying of an entire work may be fair use, Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1177, n. 15 & 16 (5th Cir. 1980); New York Times Co. v. Roxbury Data Inteface, Inc., 434 F. Supp. 217, 222 (D. N.J. 1977). The third case uses Williams & Wilkins in noting that using more than necessary to accomplish the desired effect does not foreclose a finding of fair use. Pillsbury Co. v. Milky Way Productions, Inc., 215 U.S.P.Q. 124, 132 (N.D. Ga. 1981). In the fourth case the Court of Appeals had consistently focused on the substantiality of the taking. Walt Disney Productions v. Air Pirates, 581 F.2d 751, 756 (9th Cir. 1978).

Another court cited Williams & Wilkins in a discussion of the balance between public benefit and copyright owner's gain. MCA, Inc. v. Wilson, 677 F.2d 180, 198 (2d Cir. 1981).

Three other citations are not related to photocopying.

42. 480 F. Supp. 429 (C.D. Ca. 1979), rev'd, 659 F.2d 963 (9th Cir. 1981), cert. granted, June 14, 1982, 50 U.S.L.W. 3973.

43. Id. at 450.

found liability<sup>44/</sup> but observed that Williams & Wilkins was "clearly not binding ... and, in any event we find its underlying rationale singularly unpersuasive."<sup>45/</sup>

In Encyclopaedia Britannica Educational Corporation v. Crooks<sup>46/</sup> (hereafter BOCES), the court held off-air taping of copyrighted programs for educational use to be infringement, not excused by fair use. On a first opinion, the court issued a preliminary injunction;<sup>47/</sup> on a second, judgment on the merits.<sup>48/</sup> In both opinions, the court distinguished Williams & Wilkins.<sup>49/</sup>

## 2. Conference on Resolution of Copyright Issues

On November 16, 1974 -- with Commissioner Davis' finding of infringement still at that time holding center stage in the judicial arena -- the Conference on Resolution of Copyright Issues met to attempt resolution of the library photocopying issues. It was jointly sponsored by the Copyright Office and the National Commission of Libraries and Information

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44. 659 F.2d 963 (9th Cir. 1981).

45. Id. at 970. The appellate court observed that the district court had used "Williams & Wilkins co's [sic] distortions of the fair use rationale to justify an application of the doctrine which, in our opinion, stretches fair use beyond recognition and undermines our traditional reliance on the economic incentives provided to authors by the copyright scheme." Id. (emphasis in original).

46. 447 F. Supp. 243 (W.D.N.Y. 1978).

47. Id.

48. 542 F. Supp. 1156, (W.D.N.Y. 1982).

49. See 447 F. Supp. at 251; 542 F. Supp. 1177-9.

Science. Eleven days later, Judge Davis' opinion, reversing the Commissioner's ruling was released. The Conference met in numerous working groups and three plenary sessions -- November 16, 1974, February 5, 1975, and April 24, 1975.

The Conference did not yield what Congress most needed: a concept that separated permissible library photocopying from an infringement of an author's rights, or a definition, by example or otherwise, of the prevailing concept which emerged out of Williams & Wilkins -- namely, "systematic copying." Although, in effect, the Conference agreed to disagree on the question of the obligation of libraries to compensate copyright owners for photocopying protected periodical and journal materials, it accomplished useful work in other areas. It examined copyright royalty payment mechanisms, suggested useful criteria for their development and proper mission. Additionally, the Conference developed useful material on the problem of defining serials for both library and royalty accounting purposes.

In connection with present and future reprint or photocopying licensing systems, as well as licensing for other technological uses of copyrighted materials, the work of the Conference remains valuable.

### 3. National Commission on New Technological Uses of Copyrighted Works (CONTU)

By 1967 it had become clear that the revision bill did not cover a number of computer-related copyright problems. The Senate therefore proposed to establish a National Commission on New Technological Uses of Copyrighted Works (CONTU) to study computer uses of copyrighted works and various forms of machine reproductions. The hope was that CONTU could be

set up quickly and a solution to the library photocopying issue could be devised without disturbing the overall copyright revision process. Legislation establishing CONTU was not, however, passed until December, 1974.<sup>50/</sup>

During a three-year period the Commission collected data, held hearings and analyzed the problems within its scope of inquiry. In addition, at Congress' suggestions, CONTU conducted a series of meetings at which guidelines construing certain statutory language in §108 were adopted by the interested parties.<sup>51/</sup> At the end of that time CONTU issued a report presenting its recommendations.

D. The 1966-76 Legislative History: Pressures From Interest Groups With Divergent Views.

During the same period that discussion groups were forming on both sides to attempt consensus on photocopying, some of the same groups were involved in litigation. Meanwhile, Congress proceeded with copyright law revision. Ultimately, the divergent interests, finding expression in the discussion and in the courts, influenced the drafting of library photocopying and fair use provisions.

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50. The bill was signed on December 31, 1974. App. A, Summary of the Legislative History of Computer Related Issues and the Photocopy Issue CONTU Final Report at 96, 100.

51. See text infra subsection (5) Voluntary Arrangements, for the CONTU Guidelines.

1. Specific Congressional proposals: 1966-1968.

Although Congress, like the Copyright Office, initially decided against including a separate library photocopying provision in the new bill,<sup>52/</sup> general acceptance emerged for a specific exemption permitting facsimile reproduction of unpublished manuscript collections in archival institutions under limited conditions.<sup>53/</sup>

In 1965, however, no specific provision then in the legislation dealt with any aspect of library duplication of protected works. Indeed, the fair use provision of H.R. 4347 said only, "notwithstanding the provisions of §106, the fair use of a copyrighted work is not an infringement of copyright." The Joint Libraries Committee on Copyright found this treatment acceptable.<sup>54/</sup> The American Library Association, however, explained the implications of this position through a personal statement by Robert T. Jordan of the Council on Library Resources:

The library position is based on a concept even more fundamental than fair use, which is a kind of exemption to other rights. Rather, the library position is based on the traditional characteristics of library service, going back many thousands of years. Libraries have always existed for use and use must necessarily involve copying, thus, libraries exist for the purpose of copying. In the words of the eminent counsel who assisted in the development of the library position

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52. See, e.g., the 1967 statement that the House Committee on the Judiciary did not favor a specific provision dealing with library photocopying. H.R. Rep. No. 83 at 36.

53. The new version of section 108 provided: "Notwithstanding the provision of section 106, it is not an infringement of copyright for a nonprofit institution, having archival custody over collections of manuscripts, documents, or other unpublished works of value to scholarly research, to reproduce, without any purpose of direct or indirect commercial advantage, any such work in its collection in facsimile copies or phonorecords for purposes of preservation and security, or for deposit for research use in any other such institution."

54. 1965 House Hearings at 448-9. (Rutherford Rogers).

... we have concluded that the granting of a reader's request for a single copy of such material is so clearly a direct and natural and necessary incident of ordinary library service and practice as to raise no serious question of copyright infringement."<sup>55/</sup>  
[Emphasis in the original].

Proprietary witnesses at this point generally agreed with the decision to leave the question to fair use.

On October 12, 1966, H.R. 4347 was reported out of the House Committee on the Judiciary. The bill contained a new fair use provision and the limited archival copying exemption in a new §108.<sup>56/</sup> In its report on the bill, the Committee set out its understanding of how the new §107 would apply in a number of situations. The Committee observed the relationship between §107 and photocopying by including an assessment found in the Register's Supplementary Report:

[A]n earlier effort to specify limited conditions under which libraries could supply photocopies of material was strongly criticized by both librarians and copyright owners, though for opposing reasons. The effort was dropped, and at the hearings representatives of librarians urged that it not be revived; their position was that statutory provisions codifying or limiting present library practices in this area would crystallize a subject better left to flexible adjustment. On the other hand, both the American Council of Learned

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55. Id. at 496.

56. §107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include --

- (1) the purpose and character of the use;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

See note 53 supra for the text of section 108.



Societies and the Department of Health, Education, and Welfare argued that the problem is too important to be left uncertain, and proposed adoption of a statutory provision allowing libraries to supply single photocopies of material under limited conditions.

As in the case of reproduction of copyrighted material by teachers for classroom use, the committee does not favor a specific provision dealing with library photocopying.

Unauthorized library copying, like everything else, must be judged a fair use or an infringement on the basis of all of the applicable criteria and the facts of the particular case. Despite past efforts, reasonable arrangements involving a mutual understanding of what generally constitutes acceptable library practices, and providing workable clearance and licensing conditions, have not been achieved and are overdue. The committee urges all concerned to resume their efforts to reach an accommodation under which the needs of scholarship and the rights of authors would both be respected.<sup>57/</sup>

No further action was taken on H.R. 4347. In 1967, however, H.R. 2512 was introduced in the House.<sup>58/</sup> It was similar to H.R. 4347. The report accompanying H.R. 2512 reproduced, without change, the language quoted above from the report on H.R. 4347. S. 597, introduced in 1967 by Sen. McClellan, is identical in relevant sections to H.R. 2512.

In 1967, the Senate held hearings on S. 597; the House, on H.R. 2512. Both bills contained a fair use provision and the provision permitting archival reproduction previously mentioned. Neither contained a general photocopying provision. Each bill added a phrase to §107 referring to "such use by reproduction in copies or phonorecords or by any other means specified by §106." The House Committee noted that the added phrase "should not be interpreted as sanctioning any reproduction beyond the

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57. H.R. Rep. No. 2237 at 61, 65.

58. H.R. 2512, introduced on January 17, 1967, 90th Cong., 1st Sess. by Rep. Cellar.

normal and reasonable limits of fair use, "observing that the language was added to show that section 107 "has application in areas such as photocopying and analogous forms of reproduction...."<sup>59/</sup>

Although library photocopying was not a major issue in the 1967 Senate hearings -- the focus of librarians, publishers, and authors shifted to computer uses of copyrighted works -- signs appeared that sentiment was growing for a specific provision on the subject.

These hearings disclosed dissatisfaction on both sides. Library groups showed concern over the uncertain application of the fair use provision to their operations.

The reaction of library and educational interests to the treatment of photocopying in S. 597 was sharp:

As a librarian, I can assure you that I have had publishers come into my library to investigate what materials we were photocopying and try to encourage us to stop all activity in this field. The mere enactment of the present bill will encourage threats of lawsuits over this matter. I cannot see institutions litigating this matter to establish the practice under the doctrine of fair use. Librarians feel that we would like to have some protection and not be forced to negotiate from a weak position.<sup>60/</sup>

Librarians felt that something more than a mere recital of fair use was necessary to protect them. Authors and publishers, on the other hand, felt that a royalty payment system was the solution to any problems which fair use could not solve.<sup>61/</sup>

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59. H. R. Rep. No. 83 at 31.

60. 1967 Sen. Hearings on S. 597, at 617 (statement of Erwin Surrency, Chairman of Joint Libraries Committee on Copyright).

61. See, e.g., 1967 Sen. Hearings at 976.

## 2. The 1969 metamorphosis.

By December 1969, when S. 543 ( a reintroduction of S. 597) was reported to the full Committee, it "had grown from an 8-line provision concerning archival collections to a 65-line section with six subsections dealing fairly comprehensively with 'reproduction by libraries and archives.'"<sup>62/</sup> The new section 108 dealt with the entire issue of photocopying.

As reported to the Judiciary Committee, S. 543 contained the basic elements of the present law's §§ 108(a),(b),(c),(f) and (g)(1).<sup>63/</sup> Significantly, two important differences between S. 543 and present §108 are apparent:

1. §108(d) permitted the making of a copy of a work, without distinguishing between copying small portions or complete works, subject to the overall requirement that the user has established to the satisfaction of the library or archives that an unused copy cannot be obtained at a normal price from commonly known trade sources in the United States, including authorized reproducing services;
2. No limitation on this privilege of single copying was set out, similar to that now in §108(g)(2). One new element in S. 543's single copying exemption is significant: §108(d) extended both to filling user's requests from in-house collections and through interlibrary loan arrangements.

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<sup>62.</sup> Sec. Supp. Rep., Chapter III at 11.

<sup>63.</sup> S. 543 also marked the first appearance of the provision, which extends "innocent infringer" status to librarians and archivists as well as to instructors in educational institutions.  
17 U.S.C. § 504(c)(2).

That this provision was not intended to eliminate completely the application of "fair use" to library photocopying is evidenced by the Judiciary Committee's observation in its Committee Activity report that "The rights given to the libraries and archives by this provision of the bill are in addition to those granted under the fair-use doctrine."<sup>64/</sup>

### 3. Modifications 1970-1974.

Having thus altered its approach toward library photocopying in 1969, the Senate Subcommittee did not consider the matter again until 1973. Hearings were held in that year on S. 1361. This revision bill contained both a fair use provision (§107) and a photocopying provision (§108(a)-(f)) identical to the one added in 1969:

#### §108. Limitations on exclusive rights: Reproduction by libraries and archives

(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, or distribute such copy or phonorecord under the conditions specified by this section if:

(1) The reproduction or distribution is made without any purpose of direct or indirect commercial advantage; and

(2) The collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field,

(b) The rights of reproduction and distribution under this section apply to a copy or phonorecord of an unpublished work duplicated in facsimile form solely for purposes of preservation and security or for deposit for research use in another library or archives of the type described by clause (2) of subsection (a), if the copy or phonorecord reproduced is currently in the collections of the library or archives.

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<sup>64</sup>. S. Rep. No. 219 at 6.

(c) The right of reproduction under this section applies to a copy or phonorecord of a published work duplicated in facsimile form solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a normal price from commonly-known trade sources in the United States, including authorized reproducing services.

(d) The rights of reproduction and distribution under this section apply to a copy of a work, other than a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audio-visual work, made at the request of a user of the collections of the library or archives, including a user who makes his request through another library or archives, if:

(1) The user has established to the satisfaction of the library or archives that an unused copy cannot be obtained at a normal price from commonly known trade sources in the United States, including authorized reproducing services;

(2) The copy becomes the property of the user, and the library or archives has had no notice that the copy would be used for any purpose other than private study, scholarship, or research; and

(3) The library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(e) Nothing in this section --

(1) shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises, provided that such equipment displays a notice that the making of a copy may be subject to the copyright law;

(2) excuses a person who uses such reproducing equipment or who requests a copy under subsection (d) from liability for copyright infringement for any such act, or for any later use of such copy, if it exceeds fair use as provided by section 107;

(3) in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed by the library or archives when it obtained a copy or phonorecord of the work for its collections.

(f) The rights of reproducing or distributing "no more than one copy or phonorecord" in accordance with this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same work on separate occasions, but do not extend to cases where the library or archives, or its employee, is aware or has substantial reason to believe that it is engaging in the related or concerted

reproduction or distribution of multiple copies or phonorecords of the same work, whether on one occasion or over a period of time, and whether intended for aggregate use by one individual or for separate use by the individual members of a group.<sup>65/</sup>

The 1973 Senate hearings were, insofar as photocopying was concerned, a major canvassing of Commissioner Davis' ruling. That subject dominated all testimony. As Phillip Brown, Counsel to the Association of Research Libraries observed:

Prior to Williams & Wilkins it could be argued that if libraries interpreted the 1909 act to authorize such copying and could point for support to the fact that the publisher had not challenged that interpretation and had even participated in a gentlemen's agreement for a period of years which ratified the libraries' practice, there was no need to give the libraries explicit statutory protection since the revision bill did not take away from libraries any rights which they then enjoyed under the 1909 act. Today, we submit that it is not possible to assert that position, and that the libraries' need for new explicit statutory protection for such photocopying is clear.<sup>66/</sup>

The specific amendment to §108(d) pressed by library representatives in 1973 formed the basis for what the Senate ultimately did on the whole library photocopying question.<sup>67/</sup> The 1973 testimony on §108 and the librarians' proposed amendment highlighted an increasingly important aspect of photocopying: interlibrary loan. Thus, in attacking S.1361's requirement for prior search for a copy from trade sources, Stephen McCarthy of ARL emphasized that, "[a] reader who is from a distant library seeking to obtain library materials through interlibrary loan will be

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65. S. 1361, 1973 Sen. Hearings.

66. 1973 Sen. Hearings at 92.

67. The proposal submitted by the ALA and the ARL appears in the 1973 Sen. Hearings at 106 and 89-90.

particularly penalized . . . since he will not be in a position easily without substantial loss of time to comply with the requirements of 108(d)(1)."<sup>68/</sup>

The amendment proposed by ARL and ALA, and supported by the Medical Library Association (MLA),<sup>69/</sup> obviously responded to Williams and Wilkins. Like other librarians, MLA opposed the provisions §108(d) of S. 1361 because the necessary determination of commercial unavailability of a copy meant delays in delivery of library services.<sup>70/</sup> Thus, in 1973 the libraries were focusing on interlibrary loan and, in particular, inter-library loan of scholarly, scientific, or technical (SST) articles.

Among other copyright owners, the American Chemical Society (ACS), a scientific and educational group with a large publishing activity, presented its views. To Robert Cairns, Executive Director of ACS, the librarians' requirements, centering upon STM (Scientific, Technical & Medical) publications, presented a threat to ACS's information dissemination business:

[P]hotocopying should not be allowed under any circumstances unless an adequate means of control and payment is simultaneously developed to compensate publishers for their basic editorial and composition costs. Otherwise, 'fair use' or library-photocopying loopholes, or any other exemptions from the copyright control for either profit or nonprofit use, will ultimately destroy the viability of scientific and technical publications or other elements of information dissemination systems.<sup>71/</sup>

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68. 1973 Sen. Hearings at 90. See also testimony of Dr. Edmon Low on that point. Id. at 101-102.

69. Id. at 110-112.

70. Id. at 111.

71. 1973 Sen. Hearings at 115.

Opposition of like tenor was registered by Ambassador Kenneth B. Keating, on behalf of Harcourt Brace Jovanovich, who emphasized the probable injury to be expected from the combined force of photocopying, "inter-library affiliations ... and information transfer systems," and technological progress.<sup>72/</sup> The Authors League presented parallel views, characterizing photocopying as "one-at-a-time reprinting."<sup>73/</sup>

On April 9, 1974, the Senate Subcommittee reported the revision bill to the full Committee with a modified library photocopying provision.<sup>74/</sup> In doing so, the Subcommittee made several significant changes. First, the Subcommittee accepted the essence of the librarians' proposal by distinguishing between copies for users of portions of works (subsection (d)) and entire works (subsection (e)). In the former case, libraries were permitted to make one photocopy without investigating to see if a copy could be obtained from trade sources. In the latter case, regarding entire works, furnishing a photocopy was permitted only if the work were not otherwise available. The subcommittee also added subsection 108(a)(3), requiring notice of copyright to be placed on copies, and added a new subsection 108(h) specifying those works which might not be reproduced at all except for the purposes of preservation under subsection 108(b) or replacement of damaged copies under subsection 108(c).<sup>75/</sup>

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72. Id. at 129-30.

73. Id. at 174.

74. S. 1361, (Committee Print), 93rd Cong., 2d Sess. (April 9, 1974).

75. The Subcommittee modified the language in subsection 108(c) substituting the phrase "at a fair price" for an earlier phrase of "commonly-known trade sources in the United States, including authorized reproduction services."



In another important modification, the 1974 bill added an entirely new provision, subsection 108(g)(2), providing that "the rights of reproduction and distribution under this section ... do not extend to cases where the library or archives, or its employee: (2) engages in the systematic reproduction or distribution of a single or multiple copies of material described in subsection (d)." This provision, as enacted, is of fundamental importance in considering whether a balance exists between creators' rights and users' needs. Together with subsection (g)(1), it sets out limits to the copying authorized by §108 in its entirety.

This provision became the source of intense controversy. The Senate, in introducing (g)(2), at the same time deleted any requirement that a library satisfy itself that a commercial copy was not available before photocopying an article or part of a work for a patron and imposed instead a blanket prohibition that one-to-a-customer copying must never be systematic in purpose or effect. The insertion of the prohibition against systematic copying in 108(g)(2) specifically applied to copying under §108(d). It did not need to refer specifically to §108(e); that section still required "a reasonable investigation that a copy ... cannot be obtained at a fair price."

The Senate here, then, moved to a new conceptual arrangement in §108. Its essence was:

1. Librarians' concern over the delays and expenses involved in compliance with §108(d) of S. 1361 were met by deleting the requirement of commercial non-availability for single copying of articles;
2. The protection publishers and authors obtained from this requirement would be provided instead by an overall limitation on the single copy privilege now granted — that it never be "systematic."

Systematic, of course, is a broader concept than "commercial availability."<sup>76/</sup> This history evidenced that §108(a)(2) was not superimposed on §108(d); it displaced a controversial earlier requirement of §108(d) to which librarians had objected -- namely, the search for a copy. For over a dozen years, resistance to incorporating an unrestricted single copy privilege into the statute was evidenced in and out of Congress. Its ultimate inclusion in §108(d) was accomplished by a simultaneous prohibition against systematic copying, whether one-at-a-time or not.

#### 4. The final push -- 1975 legislation.

Copyright revision bills were introduced in both houses of Congress in January of 1975. S. 22 was similar to the bill passed by the Senate in 1974, and the Senate held no further hearings on the bill. The House Committee had not considered the revision bill since 1967. A number of significant changes had been drafted by the Senate; consequently, in 1975 the House Subcommittee held extensive hearings on H.R. 2223 in order to evaluate these changes and reassess the bill in general.

A great deal of testimony at the 1975 hearings revolved around the exact limits that section 108 should establish; much of this testimony focused on 108(g), especially 108(g)(2) with its important proscription of systematic copying. Publishers sought the prohibition against systematic copying in order to make it clear that the privileges set out in subsection (d) were not to be unlimited in quantity. Librarians urged that a

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<sup>76/</sup> For a detailed discussion of the meaning of this important term, see text infra, IV A(3)(c)(ii).

clause be added to ensure that libraries could continue to participate in interlibrary loan arrangements. Librarians also argued that 108(g) took away the rights given in 108(a)-108(f).<sup>77/</sup>

In the 1975 hearings the opposing groups disagreed on what 108 should permit. The Conference on Resolution of Copyright Issues had suggested that CONTU recommend to Congress that only interim action be taken on the photocopying issue until CONTU's report and a NCLIS study were completed.<sup>78/</sup>

The Copyright Office supported section 108, but urged that the Committee consider three specific questions: 1) the relationship between 107 and 108; 2) drawing a line between permissible interlibrary loan and systematic reproduction; and 3) delineating the impact of 108 on special libraries.<sup>79/</sup>

The House Subcommittee reported the bill on August 3, 1976, with two changes in section 108. A proviso permitting interlibrary loans that were not in such "aggregate quantities" as to "substitute for a subscription or purchase" was added to subsection 108(g)(2), and a new subsection 108(i), requiring this report, was added.

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77. 1975 House Hearings at 199 (statement of Edmon Low); at 205-6 (statement of John McDonald). As hereinafter discussed, the Copyright Office believes that is the function of subsection (g): to place limits on §108 copying.

78. Id. at 2239.

79. Id. at 1794-1806.

## 5. Voluntary arrangements.

Two other 1975 modifications affected the photocopying issue. "Teaching" had been enumerated among the activities which might invoke the fair use doctrine. The House Subcommittee clarified this designation by adding to §107 the language "including multiple copies for classroom use."<sup>80/</sup>

In discussing the fair use provision, the House Report incorporated guidelines which had recently been negotiated on Classroom Copying in Not-For-Profit Educational Institutions and also those negotiated for Educational Use of Music.<sup>81/</sup>

The significance of these voluntary arrangements should not be minimized. The Ad Hoc Committee of Educational Institutions and Organizations had proposed a specific and detailed educational exemption. Dr. Wigren, Chairman of the Committee, noted that for years the Committee had attempted to come to some accommodation with publishers, authors, and producers. He observed that the Commissioner's opinion in Williams and Wilkins had caused consternation within the library community since the language used was as applicable against teachers and scholars as against as librarians.<sup>82/</sup>

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80. To allay the fears of teachers and other nonprofit users, the Subcommittee also amended section 504(c) to insulate these groups against the assessment of statutory damages.

81. H. R. Rep. No. 1476 at 68-71.

82. 1973 Sen. Hearings at 182.

The proprietary community strongly opposed the educational exemption and supported the approach adopted by the House of Representatives in 1967.<sup>83/</sup> The same proposal in 1975 received the same reaction. Chairman Kastenmeier urged the opposing parties to continue to meet to delineate the scope of permissible educational uses of copyrighted material.<sup>84/</sup>

In September, 1975, several meetings of the interested parties discussed classroom reproduction of printed material, music, and audiovisual materials. On March 8, 1976, representatives of the Ad Hoc Committee, the Authors League, and the Association of American Publishers notified Chairman Kastenmeier that they had reached agreement. Their guidelines covering books and periodicals can be found in the 1976 House Report.<sup>85/</sup>

Likewise, on April 30, 1976, representatives of the Music Publishers' Association of the United States, the National Music Publishers' Association, the Music Teachers' National Association, the Music Educators' National Conference, the National Association of Schools of Music, and the Ad Hoc Committee on Copyright Law Revision sent Rep. Kastenmeier a copy of their agreement concerning the educational use of music. These guidelines are also included in the 1976 House Report.<sup>86/</sup> That Report noted that the groups involved had not yet resolved the question of off-the-air taping for

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83. Id. at 218 (statement of Ross Sackett for the Association of American Publishers).

84. H.R. Rep. No. 1476 at 67.

85. Id. at 68-70.

86. Id. at 70-71.

nonprofit classroom use. Guidelines were established in this area in October of 1981 and included in the legislative history of Public Law 97-190, the "Piracy and Counterfeiting Amendments Act of 1982."<sup>87/</sup>

As discussed earlier, Congress had also encouraged other groups to help in formulating definitions or guidelines. CONTU was given the task of conducting negotiations concerning the amount of photocopying in lieu of interlibrary loan permitted under the proviso to (g)(2).<sup>88/</sup> For this purpose, CONTU collected comments from the principal parties<sup>89/</sup> and drafted the following set of guidelines that were incorporated in the Conference Report:<sup>90/</sup>

Guidelines for the Proviso of  
Subsection 108(g)(2)

1. As used in the proviso of subsection 108(g)(2), the words "... such aggregate quantities as to substitute for a subscription to or purchase of such work" shall mean:

(a) with respect to any given periodical (as opposed to any given issue of a periodical), filled requests of a library or archives (a "requesting entity") within any calendar year for a total of six or more copies of an article or articles published in such periodical within five years prior to the date of the request. These guidelines specifically shall not apply, directly or indirectly, to any request of a requesting entity for a copy or copies of an article or articles published in any issue of a periodical, the publication date of which is more than five years prior to the date when the request is made. These guidelines do not define the meaning, with respect to such a request, of "... such aggregate quantities as to substitute for a subscription to [such periodical]."

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87. See H.R. Rep. No. 495 at 6-9.

88. CONTU was to work with the parties to secure agreement on and draft guidelines covering practices under 108(g)(2). H.R. Rep. No. 1476 at 78.

89. CONTU Final Report at 54.

90. Conf. Rep. No. 1733 at 72-74.

- (b) With respect to any other material described in subsection 108(d), (including fiction and poetry), filled requests of a requesting entity within any calendar year for a total of six or more copies or phonorecords of or from any given work (including a collective work) during the entire period when such material shall be protected by copyright.
- 2. In the event that a requesting entity --
  - (a) shall have in force or shall have entered an order for a subscription to a periodical, or
  - (b) has within its collection, or shall have entered an order for, a copy or phonorecord of any other copyrighted work, material from either category of which it desires to obtain by copy from another library or archives (the "supplying entity"), because the material to be copied is not reasonably available for use by the requesting entity itself, then the fulfillment of such request shall be treated as though the requesting entity made such copy from its own collection. A library or archives may request a copy or phonorecord from a supplying entity only under those circumstances where the requesting entity would have been able, under the other provisions of section 108, to supply such copy from materials in its own collection.
- 3. No request for a copy or phonorecord of any material to which these guidelines apply may be fulfilled by the supplying entity unless such request is accompanied by a representation by the requesting entity that the request was made in conformity with these guidelines.
- 4. The requesting entity shall maintain records of all requests made by it for copies or phonorecords of any materials to which these guidelines apply and shall maintain records of the fulfillment of such requests, which records shall be retained until the end of the third complete calendar year after the end of the calendar year in which the respective request shall have been made.
- 5. As part of the review provided for in subsection 108(i), these guidelines shall be reviewed not later than five years from the effective date of this bill.

#### E. Enactment of 1976 Act.

The House of Representatives approved the revision bill September 22, 1976. A Conference Committee then reconciled the differences between the House and Senate versions of the bill; this Committee accepted the House modifications to sections 107 and 108. Both Houses approved the

Conference version, and President Ford signed the bill on October 19, 1976. The new Copyright Act contained the following library photocopying provision:

§108. Limitations on exclusive rights: Reproduction by libraries and archives

(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, or to distribute such copy or phonorecord, under the conditions specified by this section, if --

(1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;

(2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and

(3) the reproduction or distribution of the work includes a notice of copyright.

(b) The rights of reproduction and distribution under this section apply to a copy or phonorecord of an unpublished work duplicated in facsimile form solely for purposes of preservation and security or for deposit for research use in another library or archives of the type described by clause (2) of subsection (a), if the copy or phonorecord reproduced is currently in the collections of the library or archives.

(c) The right of reproduction under this section applies to a copy or phonorecord of a published work duplicated in facsimile form solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price.

(d) The rights of reproduction and distribution under this section apply to a copy, made from the collection of a library or archives where the user makes his or



her request or from that of another library or archives of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work, if --

(1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and

(2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(e) The rights of reproduction and distribution under this section apply to the entire work, or to a substantial part of it, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, if the library or archives has first determined, on the basis of a reasonable investigation, that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price, if --

(1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and

(2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(f) Nothing in this section --

(1) shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises: Provided, That such equipment displays a notice that the making of a copy may be subject to the copyright law;

(2) excuses a person who uses such reproducing equipment or who requests a copy or phonorecord under subsection (d) from liability for copyright

infringement for any such act, or for any later use of such copy or phonorecord, if it exceeds fair use as provided by section 107;

(3) shall be construed to limit the reproduction and distribution by lending of a limited number of copies and excerpts by a library or archives of an audiovisual news program, subject to clauses (1), (2), and (3) of subsection (a); or

(4) in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections.

(g) The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee --

(1) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group; or

(2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d): Provided, That nothing in this clause prevents a library or archives from participating in inter-library arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.

(h) The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news, except that no such limitation shall apply with respect to rights granted by subsections (b) and (c), or with respect to pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e).

(i) Five years from the effective date of this Act, and at five-year intervals thereafter, the Register of Copyrights, after consulting with representatives of authors, book and periodical publishers, and other owners of copyrighted materials, and with representatives of library users and librarians, shall submit to the Congress a report setting forth the extent to which this section has achieved the intended statutory balancing of the rights of creators, and the needs of users. The report should also describe any problems that may have arisen, and present legislative or other recommendations, if warranted.<sup>91/</sup>

F. The 108(i) Process.

Although Congress had enacted a library photocopying provision and published guidelines in its reports to help interpret this provision, by §108(i) added in 1975<sup>92/</sup> Congress required the Register of Copyrights to submit a report in 1983, and at five-year intervals thereafter "upon the extent to which this section has achieved the intended statutory balancing of the rights of creators, and the needs of users."

To fulfill this charge, the Copyright Office met with representatives of interested groups, held hearings, and sponsored studies of library photocopying.

1. The Advisory Committee.

In the summer and fall of 1978 the Register of Copyrights met separately with members of the library-user community and the publisher-author community to discuss how to approach the 108(i) mandate. From these meetings the Register decided to form an Advisory Committee composed of

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91. 17 U.S.C. §108.

92. Apparently this was in response to a Resolution submitted by NCLIS. See hereafter 1977 King Report at iv.

representatives of these two groups. Each group submitted the names of persons to serve on the group. The Information Industry Association was also asked to submit the name of a representative.<sup>93/</sup>

The Advisory Committee was primarily formed to help the Copyright Office determine the best way to collect information;<sup>94/</sup> it also worked on designing the statistical study and enlisted support in conducting it. Finally, the Advisory Committee kept the Copyright Office informed of any developments, especially on voluntary arrangements.

The Advisory Committee met regularly throughout 1978 and 1979 and continued to meet until the King Report was issued. An internal working group within the Copyright Office was also formed to serve as the steering committee for the Advisory Committee.

In the early meetings, the Advisory Committee concluded that an empirical study, such as the one on Library Photocopying in the United States that King Research had prepared for the National Commission on Libraries and Information Science, was necessary. The Copyright Office also scheduled regional hearings to elicit information from parties not reached in a statistical study. Ultimately, these -- the empirical study and regional hearings -- together with submissions became principal sources for the report.

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93. The original members of the Advisory Committee are listed in this report. See App. I at i.

94. In preparation for the first meeting the Register asked that written comments be submitted detailing the data determined to be necessary for the Copyright Office to collect and analyze in order to prepare the 108(i) report.

Later, the Advisory Committee assisted in preparing the Request for Proposals (RFP) for the survey and also the data survey instruments (the questionnaires). The Advisory Committee also helped formulate questions for the regional hearings, and it served as a liaison with various interest groups.

## 2. Regional Hearings.

Five regional hearings were held between January, 1980, and January, 1981. Four were set up to coincide with regional meetings of interested parties;<sup>95/</sup> they were also designed to cover a broad geographical range. Before each hearing a notice was published in the Federal Register inviting public participation.<sup>96/</sup> This notice gave the background and purpose of this report and included nine specific questions for comment. For wider circulation of this notice, several advertisements were run to inform

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95. Chicago - January 19, 1980, before midwinter meeting of American Library Association.  
Houston - March 26, 1980, during Annual Meeting of American Chemical Society.  
Washington - June 11, 1980, during Annual meeting of Special Libraries Association; June 20, 1980 following Annual meeting of Medical Library Association.  
Anaheim, California - October 8, 1980 during Annual meeting of American Society for Information Sciences.  
New York - January 28 and January 29, 1981.

96 . Prior to the hearing a party desiring to testify was asked to send a written request and ten copies of its statement to the Copyright Office.

librarians,<sup>97/</sup> publishers, educators, and authors of the existence of the hearings. The hearing transcripts and comment letters are published with this report.<sup>98/</sup>

### 3. King work.

King Research, Inc., of Rockville, Maryland, was selected in competitive bidding to conduct the empirical survey. (In 1977 King had also conducted the previous library photocopying study sponsored by the NCLIS, the National Science Foundation (NSF), and CONTU. Most data collection took place in 1981. The second King report (hereafter "KR") was submitted to the Copyright Office in May, 1982.

In the work King conducted six surveys.<sup>99/</sup> Three were directed to libraries, one to publishers, and two to library users. There was no separate survey of authors.<sup>100/</sup>

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<sup>97</sup> . See, e.g., the advertisement that appeared in American Libraries, Sept. 1980, at 493.

<sup>98</sup> . See App. II - App. VII.

<sup>99</sup> . All six surveys are found in the King Report App. A-D.

<sup>100</sup> . As discussed in the text infra, at IV publishers and authors are sufficiently aligned in interest that publishers can to some extent serve as proxies for authors on photocopying issues.

#### 4. Meetings of the parties.

In 1981, some representatives of libraries, publishers, and authors called for informal consultation on outstanding or narrow issues. Such exchange might, it was felt, resolve issues that had surfaced in the 108(i) process, especially the regional hearings.<sup>101/</sup>

In January 1982, an informal group assembled in response to a invitation from the Register, in which four tentative agenda items were set out:

1. Problems relating to §108(g)(2), including: definitions of "systematic,"<sup>102/</sup> the CONTU guidelines, the practical treatment of materials more than five years old, and forms used and records kept for ILL purposes;
2. Problems arising out of the applicability of §108(a) criteria to libraries in for-profit organizations, including: copying on "unsupervised" machines; the meaning of "direct" and "indirect commercial advantage," and the requirements of §108(a)(2); the relationship between for-profit libraries and non-commercial libraries in §108 transactions; the practical role of the CCC from the point of view of publishers and users;
3. In depth legal examination, as a matter of structure, statutory interpretation and practical consequences, of possible interrelationships between §§107 and 108,<sup>103/</sup> in all library contexts;
4. Practical definitional problems: what is a "library," a "notice of copyright," a "warning of copyright," including key terms used in §108(g)(1).

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<sup>101.</sup> See e.g., 1 Washington Hearing at 86 (statement of Townsend Hoopes); New York Hearing at 71, 93-94 (statement of Robert Wedgeworth); New York Hearing at 304 (statement of Irwin Karp); App. VI, Part 2 at 233, 237-8.

<sup>102.</sup> Proprietors and users did not then, and do not now, agree upon a definition of "systematic."

<sup>103.</sup> The relationship between §107 and §108 continued as a significant unresolved issue.

At this first meeting the Register emphasized that Congress had expressed a preference for settling many issues by voluntary agreements. The agenda items were examined, and it was decided to begin with the topics under point four that seemed easier to resolve and then move on to the more complex issues. Although this group held several meetings from January-October, 1982, it was not able to reach consensus on even the less complex issues.

At the last of this series of meetings, the Copyright Office stated its intention to inquire of participants, early in 1983, about whether the meetings should be resumed, and, if so, with what program and agenda. It is possible that the passage of time, the progress of various legal actions, and perhaps even the publication of this report may create an atmosphere in which substantial talks can yield results.



### III. BALANCE: ELIGIBILITY FOR §108 TREATMENT

A number of questions examined in preparing this report concerned whether or not a given entity is eligible to claim the benefit of all or some of the privileges accorded by §108. That section sets out specific criteria limiting its privileges to certain institutions. Thus, whatever the copying rules in §108 are, they may only be applied by "108-eligible" institutions. In addition to institutional eligibility, dealt with in §108(a), subsection (h) sets out rules which restrict eligible institutions in their reproduction and distribution of certain specified types of material.

#### A. Libraries.

Section 108(a) is set out below, with key terms underscored:

(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, or distribute such copy or phonorecord, under the conditions specified by this section, if:

- (1) The reproduction or distribution is made without any purpose of direct or indirect commercial advantage;
- (2) The collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and
- (3) The reproduction or distribution of the work includes a notice of copyright.

Each of these terms has generated some degree of controversy, with no real agreement on the part of librarians and publishers that all are important or even, to disinterested observers, a real problem. Some terms, however, like "direct or indirect commercial advantage," are crucial to resolution of the question of eligibility under §108 of libraries in for-profit institutions.

This report divides the library eligibility issues into two categories: those concerning permissible copying practices in general and those concerning eligible institutions. The former are addressed immediately: the requirement that all "108" copying consist of the preparation of one copy at a time and the requirement that all copies prepared bear "a notice of copyright." The latter, concerning the "openness" required of "108" libraries and the proscription of copying for a direct or indirect commercial advantage, bear heavily on complex and controversial questions about the availability of privileges under §108 to special libraries in for-profit organizations (SFP libraries). They are discussed here in conjunction with the general issue of SFP-§108 eligibility.

# 1. "Library or archives."

Section 108 speaks in terms of "library or archives." This report uses only the term "library," simply in the interest of brevity. The rules regarding copying contained in §108 apply equally and without distinction to libraries and archives.

The first issue is fundamental: what is a library? The statute does not contain a definition. The only point bearing on the question is made in the legislative history:

A purely commercial enterprise could not establish a collection of copyrighted works, call itself a library or archive, and engage in for-profit reproduction and distribution of photocopies.<sup>1/</sup>

Of course, this is only slightly helpful, since the statement also involves commerciality and for-profit photocopying -- other eligibility criteria.

No one has suggested that mere congeries of material are being created and declared "libraries" in order to obtain §108 privileges. The issue is how one should distinguish between a library, on the one hand, and a library system and its members, on the other. This sounds abstract, but it is relevant when considering whether certain copying transactions are best characterized as "local" or "ILL." Such distinctions, however, are not crucial with respect to the eligibility issues discussed here.

## 2. "No more than one copy or phonorecord..."

The most important rule in subsection (a) is that all "108" copying must consist of the preparation of "no more than one copy or phonorecord" at a time.<sup>2/</sup> However complex, confusing, or troublesome are later provisions concerning supervised, related or concerted, or systematic photocopying, all §108 copying is governed by a clear, simple, and concrete rule: no more than one copy at a time.

The extent to which this rule is being followed is unclear. From examination of nearly 16,000 photocopying transactions in which library employees photocopied materials from library collections, King Research,

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1. H.R. Rep. No. 1476, at 74.

2. Just as this report does not use the term "library or archives," it does not use the term "copy or phonorecord" as often as the statute does. Again, the law so provides, but there are generally no distinctions made between the treatment of copies and phonorecords, provided one keeps clear the distinctions, largely found in 108(h), concerning the types of works eligible for 108 copying.

Inc., projected that in 73.3% of the 14 million library photocopying transactions in which a copyright notice appeared on the copied work, a single copy was made. Thus, in more than 25% of such transactions, library employees prepared two or more photocopies at a time. The same data from which these projections are based disclose that in no more than 1.1% of all transactions had copyright owners granted permission for photocopying. Consequently, much of the "multiple" photocopying (which is never authorized by §108 of the law) must either be "fair use" (authorized by §107) or an infringement of copyright.<sup>3/</sup>

Although some multiple photocopying may be fair use,<sup>4/</sup> the amount of multiple photocopying shown in the data is incompatible with the balance crafted in §108. Related to this is the hazard that the rule "one copy at a time" may be interpreted by some to mean that single copying is always permitted. That is not correct. Section 108(a) simply provides that only single copying is eligible for treatment under §108; whether such copying is authorized by that section will always further depend on whether subsections (b) through (h) permit it. Particularly important limits to §108 copying are found in subsection (g), discussed in the next chapter.

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3. From the earliest days of copyright revision, librarians have stressed that their photocopying privileges extended only to single copying for patrons, never multiple photocopying. See, text supra, II C.

4. Section 107 identifies multiple copying for classroom use as an example of possible fair use copying, provided the criteria contained in that section are met. To provide some protective security to classroom uses of copyrighted print and musical materials, voluntary guidelines were negotiated between copyright owners and educators.

### 3. "Notice of copyright."

Subsection 108(a)(3) requires that photocopies made under §108 include "a notice of copyright." The precise conduct required by this simple-appearing phrase is the subject of substantial disagreement among the parties and can not be identified with absolute precision by the Copyright Office.

The problem is straightforward: does "a notice of copyright" mean the copyright notice set out in §§401-403 of the 1976 Copyright Act (hereafter: the chapter 4 notice), or does it mean something else? Proprietors argue that it means the former; most librarians, the latter. In addition to this question, two practical subordinate issues arise: what is required when the work being copied does not bear a chapter 4 notice, and what rules apply when the copied work does bear such a notice; but after a good faith effort, a librarian can not find it?

The legislative history is not particularly helpful. Both positions may draw some support from it. Without, for the moment, going into great detail, the law itself gives some support to both positions. In §405, in explicitly referring to the chapter 4 notice, Congress spoke more clearly: "the copyright notice required by sections 401 through 403." And, in §108(f)(1), Congress clearly called for something other than a chapter 4 notice: "a notice that the making of a copy may be subject to the copyright law."

In examining the legislative history, one sees that, a proposal for a warning of some type was made in 1961,<sup>5/</sup> a bill containing a "warning" provision as part of a "fair use" section was drafted in 1963,<sup>6/</sup> and the first versions of §108 contained no "notice" requirement similar to subsection (a)(3). What makes the recent past (and the present law) less clear than one would like is that, while §108 was changing shape, the law concerning what is now the chapter 4 notice was being dramatically changed.

Under the present law, the chapter 4 notice may be in a variety of positions on a work,<sup>7/</sup> and its complete omission does not necessarily inject the work into the public domain.<sup>8/</sup>

The process resulting in the present (a)(3) notice appears to have begun in 1973 with proposals of the Association of Research Libraries (ARL) and the Association of American Publishers (AAP). The former proposal replaced what is now the "display warning" of subsections (d)(2) and (e)(2) with the requirement that "[t]he library or archives shall attach to the copy a warning that the work appears to be copyrighted."<sup>9/</sup> The latter recommended a new subsection, not in the nature of a replacement, "to require that the appropriate copyright notice be included in any copy or phonorecord made in section 108."<sup>10/</sup> The 1974 revision bill contained the

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5. See, 1961 Register's Report, where the Copyright Office recommended that "where the work bears a copyright notice, the library should be required to affix a warning that the material appears to be copyrighted."
  6. §7(c), Copyright Law Rev., Part 3, at 7, provided: "The library shall attach to the copy a warning that the work appears to be copyrighted."
  7. See 17 U.S.C. §401(c)(1980) and 37 C.F.R. §201.20.
  8. See 17 U.S.C. §405 (1980).
  9. 1973 Sen. Hearing at 89.
  10. Id. at 147.

present (a)(3) provision,<sup>11/</sup> which was later described by the Copyright Office as meaning "a notice of copyright must accompany the reproduction."<sup>12/</sup>

The issue then slumbered until the 1976 Copyright Act came into force and libraries were required to implement §108(a)(3). Most librarians contended that the form adopted by the Council of National Library and Information Associations (CNLIA): "NOTICE; THIS MATERIAL MAY BE PROTECTED BY COPYRIGHT LAW (TITLE 17 U.S. CODE)" was sufficient to comply with §108(a)(3).<sup>13/</sup>

One law librarian, however, placed on the record her view that "the word 'notice' [in §108(a)(3)] means the statutory notice provision as described in §401."<sup>14/</sup> The record of the Copyright Office hearings on this issue shows that most librarians use the CNLIA warning, with the chapter 4 notice appearing on the photocopy only when it appears on the pages which are photocopied.<sup>15/</sup>

It is not irrelevant that, during the revision process, the library community strongly supported the retention of the chapter 4 notice requirements, for both copyright and bibliographic reasons. Throughout the

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11. S. 1361, 93d Cong., 2d Sess. (1974).

12. Sec. Supp. Rep. at Chapter III, 18.

13. See, e.g., Chicago Hearing at 23 (statement of Nancy Marshall), and 209 (statement of William Nasri); App. II, Part 2, at 248.

14. App. VII at 200.

15. 1 Washington Hearing at 34 (statement of Patricia Berger), at 148 (statement of Maureen Seaman), and 2 Washington Hearing at 58 (statement of Dean Schmidt and Gary Byrd); App. IV, Part 2, at 55.

decade during which the Copyright Act of 1976 was laboriously being constructed, the question whether to retain the long-standing notice formality of our copyright laws was often raised and discussed. The 1961 Report of the Register summed up the conflict of views, noting "considerable sentiment, particularly among some author and publisher groups, for complete elimination of the notice requirements," but that "[o]thers, especially those who use copyrighted material, have been no less firm in urging that the notice is of great value and should be retained."<sup>16/</sup> The Register's conclusion -- to retain the notice formality, but soften the legal consequences of non-compliance -- was ultimately accepted by all, and enacted into law. But, as to what materials, or activities should be accompanied by a copyright notice, the Register said:

A notice is needed more particularly when copies of the work, from which it can readily be reproduced, are placed in the hands of the public.<sup>17/</sup>

This policy seems equally valid for photocopies of protected works as it is for copies issued to the public under the authority of the copyright owner.

Quite early in the drafting stages of copyright revision, the ALA took a strong stand on the retention of what is now the chapter 4 notice,

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16. 1961 Report of the Register of Copyrights on Copyright Law Revision, at 63.

17. Id. at 64.



as "absolutely essential to libraries and library users.<sup>18/</sup> In a long analysis of many copyright issues, Edward G. Freehafer, speaking for the Joint Library Committee on Fair Use in Photocopying, commented on the importance, to users, of the copyright notice:

Printing of the notice and date of copyright has been a requirement since the first federal legislation nearly two centuries ago. Yet it has been seriously requested by representatives of authors and publishers that this requirement be dropped for certain technical reasons. This would be a serious blow to library users.

Libraries are the principal and traditional centers for the collection, classification and dissemination of information. Library users need not only the information contained in the body of published works, but the identification of the work itself. They need to know whether the work was copyrighted and by whom. Particularly pertinent is the date of copyright, as an indication of the date of the context of the work, as well as a clue to the duration of the copyright.<sup>19/</sup>

The efforts of librarians to explain the importance to users of retaining the copyright notice were supported by users, in this case, the American Association of University Professors:

With respect to notice of copyright, the academic profession does not have a distinctive interest, except as college professors may make greater use than most people of material which may be dedicated to the public without being copyrighted, and hence the profession may have somewhat greater need than others for the aid of published notices of copyright, so as to avoid infringement. The association's counsel, Prof. Ralph F.

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18. Copyright Law Rev. Part 4 at 292. To the same effect, see 1965 House Hearings at 449-50 (statement of Rutherford B. Rogers, Chairman of the Joint Libraries Committee on Copyright); at 461 (statement of Charles F. Gosnell (ALA)); at 466 (statement of Robert T. Jordan) See also C. Gosnell, "The Copyright Grab-Bag--A New Kind of Lend-Lease," reprinted in 1967 Sen. Hearings on S. 597, at 709-10, where, it was alleged that "omission of the notice was sought in the hope that once the public found that notice was not required, they would come to believe that all material were copyrighted and thereby restricted.

19. Copyright Law Rev., Part 4, at 296.

Fuchs, ... states, "I have always believed strongly in the notice requirement, and I hope it will not disappear if the statute is revised."<sup>20/</sup>

Library organizations have gone on record in favor of penalizing authors if they fail to give the public the information a copyright notice contains in a prescribed manner. Nonetheless, libraries have adopted practices with respect to subsection (a)(3) that subordinate the same public interest to the possibility of clerical inconvenience.

It is not altogether surprising, however, that libraries, having asserted that users of copyrighted works need the information in the chapter 4 notice, are reluctant to take extra steps to give it to them. The problem for libraries is that, given the large number of places a copyright notice may appear on a work, extensive clerical effort may be required to find it.

The publishers' concerns that something more than the CNLIA warning is required, and the librarians' concerns about the time and expense of looking for a notice, were considered but not resolved by the parties during informal meetings held at the Copyright Office in 1982. A draft joint memorandum summed up the differences between proprietors and libraries concerning the §108(a)(3) notice and recommended the following:

Recommended Changes in the Practices of Library Organizations

1. If a statutory notice of copyright appears on the work from which the copy is to be made on one or more of the places described below, the copy shall include a reproduction of that copyright notice, if that notice does not already appear on the actual portion of the work reproduced.

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<sup>20</sup>. Copyright Rev. Study 7 at 64, (letter of William P. Fidler).

2. The places referred to in paragraph 1 are the following:
  - a) for non-dramatic textual material printed in book form: the verso of the title page of the book, or the first page of any chapter, section or contribution from which the copy is to be made.
  - b) for non-dramatic textual material printed in the form of a periodical or serial: the first page of any particular article, section or contribution from which the reproduction is to be made, or the table of contents page of the periodical or serial issue.
3. If a statutory notice of copyright does not appear in at least one of the places described in paragraph 2, the copy made shall prominently bear the following legend:

UNLESS IT IS IN THE PUBLIC DOMAIN, THIS MATERIAL IS SUBJECT TO THE PROVISIONS OF THE U.S. COPYRIGHT LAW AND FURTHER REPRODUCTION OF THIS COPY IN VIOLATION OF THAT LAW IS PROHIBITED.

#### Recommended Changes in the Practices of Publishers

The publisher signatories to this memorandum will recommend to their constituencies that, if they wish some assurance that their statutory copyright notices will be reproduced on copies made under the purported authority of 17 U.S.C. 108, said notices should be placed as indicated in section II, paragraph 2, above.

An extraordinary amount of time has been spent by counsel and busy library and publishing professionals on this rather small issue. Given the ambiguous text and history of §108(a)(3) — ambiguity that we cannot even say was accidental or calculated -- we cannot conclusively demonstrate Congressional intention on this point.

On balance, we believe that, whatever Congress intended, the language of Subsection (a)(3) comes substantially closer to requiring the chapter 4 notice than to requiring a warning as "mild" as the CNLIA warning. Congress did not enact the early-proposed language requiring a

"warning that the work appears to be copyrighted," and it did show, in subsection (f)(1), that it recognized the difference between a "copyright notice" and "a notice that the making of a copy may be subject to the copyright law."

If this interpretation is correct, then the consensual adoption of mutually acceptable practices, perhaps similar to those in the draft quoted supra, would assist all of the parties. If that proves impossible, Congress should clarify -- through amendment of the statute or otherwise -- exactly what the meaning of Subsection (a)(3) is. The present state of confusion and dispute, about a small but significant issue, should be ended as expeditiously as possible.

#### 4. Eligibility issues with special import for SFP libraries.

The extent to which Congress intended SFP libraries to be eligible for privileges under §108 is unclear. In gauging the effect of the law on such libraries, one should consider not simply several different portions of §108, but also the scheme contained in the relationship of several important provisions. The related issues are:

1. The degree of "openness" required by subsection (a)(2);
2. The meaning of the proscription in subsection (a)(1) against copying for an "indirect" commercial advantage;
3. The extent to which patrons' copying -- when the patrons are employees of the same profit-seeking concern which owns and runs the library -- is ever "unsupervised" within the meaning of subsection (f)(1);
4. The extent to which job-related copying in such libraries is inherently "related or concerted," and thus forbidden by subsection (g)(1); and,
5. The extent to which such copying is "systematic" and thus forbidden by subsection (g)(2).

A. "Open to the public..." or "Available to researchers"

The requirement of §108(a)(2) refers to a library's collections, not simply its premises. The provisions of §108(a)(2) have, thus, established two criteria of the openness of a library's or an archive's collections; each must be met by a library or archives in order to qualify for §108 copying privileges. There would seem to be no dispute about the meaning of the phrase, "open to the public" as used in §108(a)(2): Any member of the public may use the collections of the library or archives.

Libraries may, because of the nature of their collections, or of the building they occupy, reasonably restrict public access -- as, for example, by limiting use of collections to high school students and above, or imposing conditions on their users as a prerequisite to access. No one has suggested that the kinds of commonly-encountered practices libraries apply in order to safeguard their collections, or to give priority to "researchers" as opposed to elementary school browsers, somehow takes these institutions outside §108.

However, the second criterion for establishing openness under the subsection raises questions of interpretation -- "open to other persons doing research in a specialized field." The central question becomes how restrictive non-public libraries may be in the availability of their collections and still be eligible for the §108 exemption.

When libraries place restrictions on potential user access to their collections, the issue of their §108 eligibility turns on the questions of what those restrictions are, and whether the restrictions are reasonable if they tend to exclude large classes of users. For instance, when a library restricts admission to its physical plant, can it be regarded as §108-eligible because it lists its holdings in a union catalog?

Or, because it belongs to a network or consortium in which collections are shared among members by loaning originals or by making and distributing photocopies? Or, because it lends originals or makes and distributes photocopies through interlibrary loan arrangements? Further, if libraries or archives deny access to portions of their collection, what proportion of the total collection must be open in order for the library or archives to remain eligible under §108?

Some librarians have suggested that by participating in networks, or distributing ILL photocopies to other libraries, a library meets the standards of Subsection (a)(2). Some witnesses, principally corporate librarians, implied that either network membership or interlibrary participation alone was sufficient to justify §108 eligibility.<sup>21/</sup> Other librarians or their representative organizations commented directly to that effect. A corporate librarian stated that, as the executive director of a state regional council, she had advised other librarians that active membership in a "library network satisfied the condition outlined in section 108(a)(2)."<sup>22/</sup> Likewise, the Executive Director of the Special Libraries Association pointed out that "most special libraries cooperate in interlibrary loan arrangements among all types of libraries in their area so that their materials are available to the public and researchers without the need for an on-site visit."<sup>23/</sup>

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21. New York Hearing at 134 (statement of Ben Weil), and at 282 (statement of Elizabeth Usher).

22. App. II, Part 2, at 122.

23. App. VI, Part 2, at 237.

The question of "openness" or "availability" takes on a specially important dimension when raised in the context of library operations in for-profit corporations. At the last hearing held by the Copyright Office, the Special Libraries Association witness, although herself a former "not-for-profit" librarian, spoke to the eligibility issues thus:

We also wish to restate the fact that the law makes no distinctions about types of libraries. The "entrance requirements" to the exemptions of section 108 apply to any library, be it a public, academic, school or special library.

There has been a persistent thread of testimony to the effect that libraries in for-profit organizations are not entitled to all the exemptions of section 108. This is clearly a distortion of the law and reflects a misunderstanding about the nature of special libraries in for-profit organizations. As SLA has said before, a completely closed library of any kind is a rarity in this area of public availability, either in person or through interlibrary loan of materials.<sup>24/</sup>

The Copyright Office believes that the law does make distinctions among types of libraries. First, as noted earlier, a library whose collections are available only "through interlibrary loan of materials" should not fairly be said to have met the standards set out in §108(a)(2). Second, and more importantly, libraries eligible, via subsection (a), for §108 privileges, are not all treated alike under the law; indeed, their behavior is the subject of important distinctions, based on all of the "SFP-eligibility" issues set out above.

A commercial for-profit entity which desires to avail itself of privileges under §108 must make its collections open to the employees of its competitors. The basic rule in §108(a)(2) is that collections be open either to the public or to unaffiliated persons doing research in a specialized field. There are no expressed or implicit reservations as to

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<sup>24</sup>. New York Hearing at 282.

what classes of potential patrons may be forbidden entry to a §108 library. The Copyright Office believes that restrictions based on age or educational status may be made without loss of privileges under §108, but that entrepreneurs, who establish libraries on their premises as integral parts of their profit-seeking operations, must make their collections available to all persons doing research in the fields of their collections if they want to make photocopies under §108.

The statute's use of the plural -- "the collections of the library" -- with no modifiers such as "most of" or "a substantial portion of" indicates that libraries, to be eligible for §108 treatment, must permit public (or at least broad and nondiscriminatory) access to the great bulk of their collections.<sup>25/</sup> A library in which substantial portions of the collection are "closed" is not eligible for §108 privileges. To recapitulate: a library is not "eligible" to the extent of its "openness"; it is, rather, eligible if the substantial majority of its collections are sufficiently open or accessible.

b. "Indirect" commercial advantage.

Subsection (a)(1) requires that:

the reproduction or distribution [be] made without any purpose of direct or indirect commercial advantage;

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25. Of course, special collections, such as rare book rooms and the like, may be maintained under special conditions, but even there the public should have access to the materials.



Although this may appear clear, and although the language of Subsection (a)(1) has not changed since it was first introduced in 1969, it has caused some confusion and much dispute. Some of this disagreement may be attributed to differences among the various reports comprising the legislative history of the 1976 Copyright Act. The relevant text of these reports is set out here.

Speaking first, the Senate stated:

The limitation of section 108 to reproduction and distribution by libraries and archives "without any purpose of direct or indirect commercial advantage" is intended to preclude a library or archives in a profit-making organization from providing photocopies of copyrighted materials to employees engaged in furtherance of the organization's commercial enterprise, unless such copying qualifies as a fair use, or the organization has obtained the necessary copyright licenses. A commercial organization should purchase the number of copies of a work that it requires, or obtain the consent of the copyright owner to the making of the photocopies."<sup>26</sup>/

Almost one year later the House Judiciary Committee discussed the matter at greater length:

Under this provision, a purely commercial enterprise could not establish a collection of copyrighted works, call itself a library or archive, and engage in for-profit reproduction and distribution of photocopies. Similarly, it would not be possible for a non-profit institution, by means of contractual arrangements with a commercial copying enterprise, to authorize the enterprise to carry out copying and distribution functions that would be exempt if conducted by the non-profit institution itself.

The reference to "indirect commercial advantage" has raised questions as to the status of photocopying done by or for libraries or archival collections within industrial, profit-making, or proprietary institutions (such as the research and development departments of chemical, pharmaceutical, automobile, and oil corporations, the library of a proprietary hospital, the collections owned by a law or medical partnership, etc.).

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26. Sen. Rep. No. 473 at 67.

There is a direct interrelationship between this problem and the prohibitions against "multiple" and "systematic" photocopying in section 108(g)(1) and (2). Under section 108, a library in a profit-making organization would not be authorized to:

- (a) use a single subscription or copy to supply its employees with multiple copies of material relevant to their work; or
- (b) use a single subscription or copy to supply its employees, on request, with single copies of material relevant to their work, where the arrangement is "systematic" in the sense of deliberately substituting photocopying for subscription or purchase; or
- (c) use "interlibrary loan" arrangements for obtaining photocopies in such aggregate quantities as to substitute for subscriptions or purchase of material needed by employees in their work.

Moreover, a library in a profit-making organization could not evade these obligations by installing reproducing equipment on its premises for unsupervised use by the organization's staff.

Isolated, spontaneous making of single photocopies by a library in a for-profit organization, without any systematic effort to substitute photocopying for subscriptions or purchases, would be covered by section 108, even though the copies are furnished to the employees of the organization for use in their work. Similarly, for-profit libraries could participate in interlibrary arrangements for exchange of photocopies, as long as the production or distribution was not "systematic." These activities, by themselves, would ordinarily not be considered "for direct or indirect commercial advantages," since the "advantage" referred to in this clause must attach to the immediate commercial motivation behind the reproduction or distribution itself, rather than to the ultimate profit-making motivation behind the enterprise in which the library is located. On the other hand, section 108 would not excuse reproduction or distribution if there were a commercial motive behind the actual making or distributing of the copies, if multiple copies were made or distributed, or if the photocopying activities were "systematic" in the sense that their aim was to substitute for subscriptions or purchases.<sup>27/</sup>

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<sup>27</sup>. H.R. Rep. No. 1476 at 74-75..

How the three examples help explain the meaning of "indirect" is unclear. All of them appear to be outside §108 without regard to "indirect commercial advantage" situations. Example "(a)" involves multiple photocopying, proscribed by subsections (a) and (g)(1); while "(b)" and "(c)" both violate subsection (g)(2)'s rule against "systematic" photocopying. Finally the Conference Report states as follows:

Another point of interpretation involves the meaning of "indirect commercial advantage," as used in section 108(a)(1), in the case of libraries or archival collections within industrial, profit-making, or proprietary institutions. As long as the library or archives meets the criteria in section 108(a) and the other requirements of the section, including the prohibitions against multiple and systematic copying in subsection (g), the conferees consider that the isolated, spontaneous making of single photocopies by a library or archives in a for-profit organization without any commercial motivation, or participation by such a library or archives in interlibrary arrangements, would come within the scope of section 108.<sup>28/</sup>

From comparing these legislative reports, the House and Conference analyses would permit more photocopying under §108, in for-profit entities, than would the Senate Report. In construing a statute there are, of course, many rules and canons which may be followed, particularly concerning what to make of legislative committees' comments about the bills upon which they have acted favorably.<sup>29/</sup>

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<sup>28.</sup> Conf. Rep. No. 1733, at 73-74.

<sup>29.</sup> There are sound reasons for granting weight to the report of the first committee to act on a bill when the language recommended by that committee ultimately becomes the law. See Hawkes v. Internal Revenue Service, 467 F.2d 787 (6th Cir. 1972); Getman v. N.L.R.B., 450 F.2d 670 (D.C. Cir. 1971). This suggests that the Senate's language, although more restrictive than the later language in the House and Conference Reports, retains vitality.

Although there is ambiguity in the legislative history with respect to §108(a)(1)'s proscription of unauthorized photocopying for "direct or indirect commercial advantage," the same phrase is more clearly discussed in the history of §110(4).<sup>30/</sup> The Senate and House Reports both state:

This provision expressly adopts the principle established by the court decisions construing the "for-profit" limitation [of the 1909 Copyright Act]: that public performances given or sponsored in connection with any commercial or profit-making enterprises are subject to the exclusive rights of the copyright owner....<sup>31/</sup>

It is at least likely that the same language in §108 must have largely the same meaning, i.e., that it concerns photocopying "in connection with any commercial or profit-making enterprises."

Wholly apart from the legislative reports, moreover, one must remember that the statute provides simply that §108 privileges are available only to libraries who copy for neither direct nor indirect commercial advantage. If making and selling photocopies for a profit is the pursuit of a "direct" commercial advantage, and if the House and Conference Reports' interpretations are correct, it is not at all clear what, if anything, remains of the proscription of copying for an "indirect" commercial advantage. But, of course, that language must have some meaning, i.e., there must be some photocopying in pursuit of an "indirect commercial advantage," proscribed here, which would otherwise be lawful under §108.

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30. 17 U.S.C. §110(4) provides: "Notwithstanding the provisions of §106, the following [is] not an infringement of copyright: ... (4) performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage...." (Emphasis added).

31. Sen. Rep. No. 473 at 77; H.R. Rep. No. 1476 at 85.

The record is devoid of any enlightening discussion of this; and the Copyright Office is not now in the position to perform the fine policy-oriented analysis which the question demands. The parties should agree upon the meaning of the phrase "indirect commercial advantage." That would achieve immediate certainty and avoid the hazards, delay, and expense of judicial interpretation. The only cases of which the Copyright Office is aware in which publishers have sued for-profit corporations over their photocopying practices resulted in consent decrees, so there is, as yet, no formal court opinion concerning this matter.<sup>32/</sup>

5. Other issues bearing on SFP eligibility.

a. "Supervised" patron copying.

A general discussion of subsections (f)(1) and (f)(2) is found in chapter four of this report. This briefer discussion simply addresses the issue in an SFP context. When an employee of a for-profit entity, acting in furtherance of his job, makes a photocopy from a company-owned copy of a copyrighted work on a company-owned photocopy machine on the company's premises, his behavior is within the scope of his employment. As such, it seems rather more supervised than the copying to which subsection (f)(1) is directed: unsupervised copying by patrons having no legal or economic relation relationship with the library or its parent entity.

The patron, of course, will be personally liable for all copying which is not fair use, as provided by subsection (f)(2). This means that the criteria in §107 apply, including the "character of the use" test: whether the use is of a commercial nature. While the distinction seems

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<sup>32.</sup> See, e.g., Harper & Row Pub. Co. v. Squibb Corp., No. 82 Civ. 2363 (S.D.N.Y., settlement agreement dated Nov. 19, 1982).

clear, it may bear emphasis: research in applied physics, for example, performed by an employee of an aerospace engineering firm, and similar research by a graduate student in a university, may both involve the photocopying of the same scholarly articles, but the copyright consequences are different: the former copying is of a clearly commercial nature, and less likely to be fair use.

b. "Related or concerted" copying.

When all copying done in a library is done, essentially, in furtherance of the parent company's mission, in most instances the preparation of multiple copies, whether on one occasion or several, should be regarded as related or concerted, and thus require the permission of the copyright owner if it is to be lawful, as provided by Subsection (g)(1).

c. "Systematic" copying.

This critically important term, about which the parties disagree, is discussed at substantial length in the next chapter. Its significance here is simply that Subsection (g)(2)'s proscription of "systematic" copying means that if a corporate library's action, in photocopying periodical articles or short portions of other works, is done in accordance with a general plan, system, or routine, then it must be authorized by the copyright owner. For example, any firm whose library, as a regular practice, prepares photocopies of recently received journal articles for circulation in the firm, should obtain copyright permission to do so, since such a practice is systematic.

d. SFP Recapitulation.

No single provision in the law states that privileges under §108 are extremely limited for corporate libraries, and, indeed, the ambiguous legislative history contains some suggestions to the contrary. The Copyright Office believes, however, that any analysis of an SFP library's 108 status must recognize the following rules which are derived from the language of the statute itself:

1. If §108 privileges are desired, most or all of an SFP library's collections must be open to competitors' employees.
2. The ban on copying for an indirect commercial advantage must be accorded some meaning.
3. Patron copying in SFP libraries is much more likely to be "supervised" than in other types of libraries, since most SFP patrons are acting in furtherance of their employer's mission when they make photocopies.
4. Copying in an SFP library, where the librarians and patrons are employees of the same entity, may be at once more "related or concerted" and "systematic" than is the case in other types of libraries.

B. Works.

1. Meaning of Section 108(h).

Subsection 108(h) was the subject of little comment and controversy during the Copyright Office five-year review. There was, however, a major proposal for legislative amendment to this subsection.

The broad reproduction and distribution privileges provided by subsections (d) and (e) apply to literary works, dramatic works and sound

recordings. By subsection (h), these privileges of reproduction and distribution do not apply to musical works, pictorial, graphic or sculptural works or to motion pictures or audiovisual works except those dealing with news. The exclusions under subsection (h) do not apply to archival reproduction under subsection (b), to replacement of damaged or lost copies or phonorecords under subsection (c), or to "pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e)."

As the Congress pointed out:

Although subsection (h) generally removes musical, graphic, and audiovisual works from the specific exemptions of section 108, it is important to recognize that the doctrine of fair use under section 107 remains fully applicable to the photocopying or other reproduction of such works.<sup>33/</sup>

The comments during the review period about the effects of section 108 on non-print material were mixed and inconclusive. Some librarian representatives felt that §108 had a chilling effect on their reproduction of non-print material unless it was locally produced and releases from its creators were obtained<sup>34/</sup> and that §108 had curtailed the dissemination of non-print material either noticeably<sup>35/</sup> or only to some extent.<sup>36/</sup> Other librarians reported no change in their colleagues' practices regarding non-print material as a result of the new law.<sup>37/</sup>

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33. H.R. Rep. No. 1476 at 78.

34. App. VII at 256.

35. App. III, Part 2, at 58.

36. App. III, Part 2, at 56; 2 Washington Hearing at 31-32.

37. App. VI, Part 2, at 130.



A librarian who had conducted a survey of health science libraries reported that there were three basic types of copying of non-print materials in those libraries. They were: (1) copying to change the format of a program (for example, putting a 16-millimeter film on videotape); (2) copying to replace a damaged original; and (3) copying in anticipation of deterioration or damage. According to this witness, 93% of the librarians who made these copies of audiovisual material sought the permission of the copyright owner rather than relying on fair use or other provisions of the law.<sup>38/</sup> Two other librarian witnesses testified that they neither lend nor copy and lend non-print materials in ILL transactions.<sup>39/</sup>

The King Study contains some evidence of the level of library activities with respect to the off-the-air taping of television news broadcast and the copying of previously recorded audio discs or tapes. The results show that less than three percent of the libraries which have substantial photocopying activity report off-the-air taping of news broadcast while nearly ten percent report copying previously recorded discs or tapes. According to these data, academic libraries copy most frequently, with 5.5 percent recording news broadcasts and 19.8 percent recording previously recorded discs or tapes.<sup>40/</sup>

A major publisher's representative testified that his firm's policy was to allow school system or library purchasers of foreign language

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38. 2 Washington Hearing at 24.

39. Chicago Hearing at 25 and 151.

40. KR at 2-31.

tapes to make duplicate copies for archival purposes.<sup>41/</sup> A librarian confirmed this practice.<sup>42/</sup> The same publishing witness also said that his firm often approves, without charge, requests by school systems or libraries to convert 16-millimeter film to videotape.<sup>43/</sup>

Several librarians called for the development of guidelines for library uses of non-print materials. One called for development of specific guidelines through a dialogue between producers and users, pointing out that they were needed because libraries are reluctant to lend their audiovisual materials to other libraries and because of the increased use of restrictive contractual language as to use by producers in purchasing agreements.<sup>44/</sup> Another, from an academic library, with a large collection of audiovisual materials also addressed the need for guidelines.<sup>45/</sup>

The Copyright Office joins in the call for the development of guidelines by users and creators as a means of resolving their differences concerning the use of non-print material by libraries or archives. The viability of the negotiating process, although not clear from the 1982 round of photocopying discussions among the parties, may be seen in the joint recommendations of the Music Library Association (MLA) and the Music Publishers' Association of the United States. During the course of the preparation of this report, representatives of the MLA expressed concern that §108 copying privileges should cover musical works. They stated that "musical works are just as proper a topic for serious study as are other

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41. 2 Washington Hearing at 152 (statement of Charles Butts).

42. App. II, Part 2, at 221.

43. 2 Washington Hearing at 152.

44. Id. at 8-9.

45. Anaheim Hearing at 55 and 83 (statement of James Cox).

forms and kinds of copyrightable documents that incorporate an original text." They urged that excluding musical works has impaired research and has even disserved the interests of music publishers.<sup>46/</sup>

When proposals to include music in §108 have been made in the past, music publishers have traditionally responded that the "primary purpose of music is performance." They have contended that the overwhelming majority of photocopies that would be made (if the section 108 exemption applied to music) would be for precisely that purpose. They also pointed out that fair use would, in most cases of real scholarly use, allow all that is needed -- copies of short extracts for illustrative purposes -- and that satisfactory joint arrangements have already been worked out with respect to obtaining copies of out-of-print music.<sup>47/</sup>

In an effort to resolve the problems experienced by music libraries and archives, an ad hoc joint committee of the MLA and the Music Publishers' Association of the United States came to an agreement and recommended adding a new paragraph to subsection (e):

The rights of reproduction granted by subsection (e) may be exercised by libraries and archives in respect of musical works if the library or archive shall first undertake a reasonably diligent search for the copyright proprietor of such musical work, which search shall include, but not be limited to, the records of the Copyright Office. If, following such search, the copyright proprietor cannot be located, the library or archive may reproduce such musical work in accordance with subsection (e). If the search discloses the identity and location of the copyright proprietor, no such reproduction may be undertaken without the approval of the copyright proprietor.<sup>48/</sup>

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46. App. VII at 147.

47. Sec Supp. Rep. at 30.

48. App. VII at 152.

The Copyright Office endorses this amendment, and suggests an accompanying technical amendment to subsection (h) to take the proposed revision of subsection (e) into account. The Copyright Office likewise endorses the process whereby the amendment was proposed: negotiations among proprietors and library groups resulting in a small, but significant, modification of §108, and, assuredly, a clarification of the "rules of the road." The Copyright Office believes that any negotiated agreement — whether or not addressed to a proposed statutory change — is a positive development which should be encouraged by Congress and, for that matter, all concerned.

## 2. Foreign works.

The copyright law in this country contains provisions governing the use of copyrighted in works of foreign authors and works published abroad.<sup>49/</sup> It is, of course, beyond the scope of this report to examine in any detail the nature of international copyright in general or the terms of all U.S. obligations in particular. With respect to library photocopying, what should be remembered is fairly simple. Works first published in countries with whom the United States has copyright relations, whether by multilateral convention,<sup>50/</sup> bilateral treaty, or presidential proclamation, must be treated just as domestic works are. In this context, that means that they may be photocopied only when the law — in §107 or §108 — clearly authorizes such copying, or when the copyright owner does so. The

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49. 17 U.S.C. §104 (1980).

50. Chiefly the Universal Copyright Convention, 6 U.S.T. 2731, T.I.A.S. 3324 (1955); 25 U.S.T. 1341, T.I.A.S. 7868 (1974).

list of countries with whom we have copyright relations is long;<sup>51/</sup> and the safest (and usually required) route to follow is to treat all foreign published works as fully protected by the United States copyright law.

Unpublished works, copyable only under the provisions of §108(b),<sup>52/</sup> are fully governed by the copyright law without regard to the nationality or domicile of the author.<sup>53/</sup>

Most of the evidence of record is that librarians do not distinguish between domestic and foreign copyrighted works when they make photocopies. The general tenor of comments by librarians was that foreign and domestic works receive similar treatment.<sup>54/</sup> That foreign publishers expect such treatment is shown by the fact that, in 1980, approximately 30% of the publishers whose works were registered with the CCC were located outside the United States.<sup>55/</sup>

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51. See Copyright Office Circular R38a.

52. See, text infra, IV A(2)(a).

53. 17 U.S.C. §104(a) (1980).

54. See Chicago Hearing at 150, Houston Hearing at 14; and 2 Washington Hearing at 11.

55. 1 Washington Hearing at 229 (statement of David Waite).



#### IV. BALANCE: COPYING AND OTHER ISSUES

##### A. Copying in and Distribution by §108 Libraries.

1. Overview. The question whether a balance exists between the rights of creators and the needs of users ultimately turns not only on what the copyright law says but also on how people whose behavior is within the ambit of that law — here, chiefly, librarians and library patrons — actually do behave. A law which sets out to strike a balance between any conflicting claims must be assessed ultimately by whether the conduct of the persons within its ambit can fairly be said to comport with the behavior intended by Congress.

In the case of library photocopying, the balance between creators and users is a function not simply of how librarians behave under the provisions of §108, but of how the tension between the rights of creators and the needs of library patrons is (or is not) resolved. This larger question requires one to look at all photocopying of library materials which occurs in the library milieu: copies made by librarians<sup>1</sup>/ for their own or other libraries' collections, copies made by librarians for permanent transfer to patrons in their own or other libraries, and copies made by patrons for themselves, their colleagues, students, friends, or employers.

When discussing these issues of balance the use of correct terminology is of primary importance. For nearly a century libraries have engaged in a practice known as "interlibrary loan," wherein materials in the collection of one library are made available to patrons in another.

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<sup>1</sup>. This term is used here to refer to all library employees, including professional and clerical staff.

When this is done by lending a printed (or other authorized) copy of a work to the "receiving" library on a temporary basis, the appellation loan is clearly correct and informative. When, however, this is done by making a photocopy (without the copyright owner's permission) which is then permanently transferred, by gift or by sale, to the receiving library or its patron, loan is at least imprecise.

Libraries have traditionally lent materials with no concern for the copyright law. This strong tradition may well account for the continued use of the term to describe a transaction which in no way resembles a loan. The distortion created by such misuse is that one may easily ignore the profound change in the role of libraries effected by the growth of photocopying. Data discussed in Chapter 5 of this show that among the library patrons surveyed between one-fifth and one-quarter had asked libraries to obtain for them works from the collections of other libraries (which, when delivered, were often in the form of photocopies), and roughly three-fifths of the patrons interviewed upon entering libraries had made or obtained photocopies of library materials in the preceding six months. For a significant portion of the library user community, the library has become the location for acquisition of as well as access to, copyrighted materials. This phenomenon, which has been styled "republishing" should not be glossed over by calling some photocopying transactions "loans" when they are not.

Because the law contains somewhat different provisions concerning these various types of copying, we here address them separately.



## 2. The Relationship Between Sections 107 and 108.

The disputes between the proprietary and library communities about the exact meaning or intent behind certain words and phrases in section 108 are not the only important areas of disagreement. An overarching issue involves the broader (and harder) question about the relationship of §107, in which the doctrine of "fair use" is now codified, to §108, in which "special" rules governing certain libraries are set out.

This question appears straightforwardly in a position articulated by a spokesman for the Association of American Publishers (AAP):

whether or not section 108 rights are ... intended as a restatement or a clarification of library copying rights or whether they are, as we think, additional property rights, the converse cannot be true. Section 107 rights cannot for all practical purposes exceed those granted by section 108. This was never questioned by library representatives in the hearings before the House and Senate Committees, and indeed was so stated by one of the principal representatives of the library community, and is implicit in the legislative explanations and justifications for the provisions of section 108.<sup>2/</sup>

The issue is, of course, whether a librarian who has made all of the photocopies permitted by §108 in a given type of transaction<sup>3/</sup> may thereafter make one or more additional photocopies under the fair use provisions of §107, or whether such copying is infringing unless authorized by the copyright owner.

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2. Chicago Hearing at 68 (statement of Charles Lieb, Esq.).

3. Although the proprietary and library communities often disagree about whether, in a specific case, this boundary has been reached, the abstract question here assumes that all §108 copying privileges have been exhausted.

The most accurate answer is the lawyers' commonplace: "It depends." The Copyright Office does not believe that Congress intended that there should never be fair use photocopying "beyond" §108. On certain infrequent occasions, such copying may be permitted. But fair use privileges are not available on a broad and recurring basis once the copying permitted by §108 has occurred. Section 108 was enacted to make lawful some types of copying which would otherwise be infringements of copyright, fair use notwithstanding.<sup>4/</sup> This means that much "108" photocopying would be infringing but for the existence of that section, thus leaving section 107 often clearly unavailable as a legal basis for photocopying not authorized by section 108.

The library community's response to the AAP position -- that §108 is a "cap" on photocopying -- has generally been in the nature of a reference to the fact that fair use privileges exist and appear to be incorporated into the library photocopying calculus by section 108(f)(4)'s terms: "Nothing in this section... in any way affects the right of fair use as provided by section 107...."

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4. This is clear from the legislative history of §108. The House Report states that "section 108 authorizes certain photocopying practices which may not qualify as a fair use." H.R. Rep. No. 1476 at 74. It reinforces this position by stating, "[n]otwithstanding [§106] ... section 108 provides that under certain conditions it is not an infringement of copyright for a library ... to reproduce ... not more than one copy ... of a work ...." *Ibid.* (Emphasis added). Indeed, the library community sought §108 to permit copying that had not been spelled out in the proposed fair use provision. 1967 Sen. Hearings at 617 (statement of Erwin Surrency). And, of course, it is well settled that statutes must be construed so as to give all their provisions meaning. *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979); *United States v. Menasche*, 348 U.S. 528 (1955); 2A Sutherland, *Statutes & Statutory Construction* (Sands ed.) §46.06 (1973). Here, of course, that strongly suggests that §108 exists to create immunity from infringement liability for copying that is not fair use, since to hold otherwise would be to render §108 superfluous.

The legislative history behind this provision is rather sparse. The Senate and House Reports do nothing more than quote it,<sup>5/</sup> and the Conference Report ignores it altogether. The revision record also reveals little of the intent behind the language. From the time it appeared in the first broad library photocopying provisions in a "revision bill" in 1969, <sup>6/</sup> it has remained essentially unchanged <sup>7/</sup> and largely unexplained.

This report recommends that any analysis of the relationship between §§107 and 108 be carried out not on broad theoretical grounds but on a case-by-case basis. The analysis should be guided by a few clear principles:

- a) That §108 was enacted to exempt certain non-fair use library photocopying from copyright liability;
- b) That §108(f)(4) states that fair use is not affected by §108; and
- c) That a fair use examination of a photocopying transaction "beyond" §108 must be made with due consideration for the fact that "108" copying privileges have already been exhausted.

This last point is included here as a means for providing some guidance to anyone attempting a "107/108" analysis of a specific transaction. Its purpose is to serve as a reminder that the tension between points (a) and (b) need not frustrate reaching a result. That fair use is not "affected" by §108 hardly means that photocopying "beyond" §108 is likely to be fair use. Indeed, it may well be that the purpose of §108(f)(4) was simply to state that the enactment of §108 did not in any

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5. S. Rep. No. 473 at 69; H.R. Rep. No. 1476 at 77.

6. This occurred in the version of S. 543 reported to the full Senate Committee on the Judiciary on December 10, 1969.

7. Its location has shifted, but not its text. It was originally §108(e) (3).

way vitiate the provisions of §107. This means that the "tests" implicit in §107 may be applied to photocopying "beyond" §108; it says nothing about how frequently those tests will be "passed" (i.e., how frequently such copying will prove to be fair use).

To read §108(f)(4) as permitting "post-108" reliance on fair use as if no §108 copying had occurred is to come dangerously close to reading §108 out of the statute. Since §108 was deemed necessary to exempt much library photocopying from copyright liability, and since Congress did not likely intend to construct the complex mechanisms in most of the section only to render them moot via subsection (f)(4), that result is implausible. The better position is that library photocopying "beyond" 108 may be fair use if both:

- (a) the transaction is of a type which could be fair use in the absence of §108, and
- (b) the fair use analysis (conducted only if (a) applies) of this transaction takes into account the "108" copying which has already occurred.

The first part of the test is important. It acknowledges the differences, discussed later, between, for example, replacement copying under subsection (c) and ILL copying permitted by the proviso to subsection (g)(2). Part (a) means that, for either type of transaction -- beyond 108 -- one should first consider whether fair use could ever apply to such a transaction, i.e., whether, if there were no §108, such a transaction could be lawful. In the examples given, one would likely conclude that the replacement of a lost, stolen, damaged, or deteriorating copy could be a fair use, while all ILL copying, a form of systematic copying lawful only via the proviso, could not be a fair use. This means that for copying

beyond 108, the examination of a specific transaction (part (b) of the test) would occur with respect to replacement copying, but not with respect to systematic copying, which could never be fair use.

Obviously, in considering the effect of the "post-108" photocopying upon the potential market for or value of the copyrighted work,<sup>8/</sup> "counting" the 108 photocopying which has previously taken place will often lead to a different result than if one examines the later copying as if no earlier copying had occurred.

At all events, there are data in the hearing transcripts, the comment letters, and the King Report which suggest that librarians are either confused about the meaning of §§107 and 108 or that they take the position that broad photocopying is permitted under fair use on a basis separate and independent from §108, or in addition to it. For example, the King data show that almost as many photocopying transactions for ILL purposes are stated by librarians to be fair use as are stated to be authorized by §108. <sup>9/</sup> If our interpretation is correct, and photocopying in lieu of interlibrary loan is "systematic" photocopying,<sup>10/</sup> then fair use should rarely be available as a legal basis for such photocopying. Either much photocopying that is properly authorized by §108 (if at all) is believed by librarians to be authorized instead by §107, or, after §108 is "exhausted," librarians turn to §107 for a volume of interlibrary photocopying virtually equal to that authorized by §108.

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8. This is the fourth fair use criterion found in §107.

9. See, KRT 3.11.

10. See, text infra, IV A.

Specific statements of various librarians are set out here to show the level of uncertainty engendered by the somewhat unclear relationship between the sections. William Budington, of the Special Libraries Association, speaking "from a personal point of view," answered "yes" to the question whether fair use was available "once the copying that is permitted under section 108... is exhausted."<sup>11/</sup> Alice Wilcox, of the MINITEX network, indicated a more conservative policy in her statement: "You would not [first] seek your rights under section 108 and then go to 107."<sup>12/</sup>

The significance of section 108 may sometimes be underestimated or misunderstood, as when a librarian stated, with respect to the 107-108 relationship:

[L]ibraries always make copies only for fair use.  
The material is usually needed immediately and users  
generally do not want to wait.<sup>13/</sup>

This quotation is troubling for two reasons. First, if the balance between proprietors and users depended solely on what users wanted, then not merely §108, but copyright itself would not be viable. Second, it reflects substantial unawareness of the meaning of section 108, viz., that libraries, to avoid liability for copying which is not fair use, must rely on the terms of §108 for most of their photocopying.

Harriette Cluxton, a medical librarian, expressed a position with which there appears to be substantial agreement within the library community:

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11. Chicago Hearing at 178-179.

12. Chicago Hearing at 58.

13. App. III, Part 2, at 54.

If making a copy in the first place is legal for the end user [because it is fair use], it is hard for us to understand why we cannot get that copy and sometimes we actually cannot if we are going to stick to section 108.<sup>14/</sup>

This quotation identifies one of the thorniest problems concerning the relationship between sections 107 and 108. A proposition put to 27 Chicago-area health-care librarians puts the issue in focus:

Libraries are currently restricted from doing some things that would be fair use for individuals. The librarian should be permitted to serve as a fair use agent, with final liability for any misuse vested in the patron/user.<sup>15/</sup>

That Congress intended a different result is clear. As the House Committee stated, in demonstrating its intent [that agency rules] not apply to copying entities:

[I]t would not be possible for a non-profit institution; by means of contractual arrangements with a commercial copying enterprise, to authorize the enterprise to carry out copying and distribution functions that would be exempt if conducted by the non-profit institution itself.<sup>16/</sup>

Just as commercial copiers may not avail themselves of their library customers' copying privileges, it may be that libraries can not avail themselves of their patrons' copying privileges. This point is pivotal. Section 108 is directed to "Reproduction by libraries and archives." And, in drafting the complex system of exemptions, procedures, and rules in §108, Congress used libraries and archives as a focal, and usually visible,

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14. Chicago Hearing at 160.

15. App. II, Part 2, at 218.

16. H.R. Rep. No. 1476 at 74.

point of control. Congress and its laws may reach private photocopying only with difficulty, but can reach photocopying in libraries "open to the public" with relative ease. And have Congress chose to do so.

Librarians sometimes question whether they should reasonably be expected to enforce the law with respect to the photocopying which occurs on their premises.<sup>17/</sup> Simply put the answer is "yes." The law, in §108, requires them to monitor and, to a certain extent, to control the photocopying that occurs on their premises. If Congress had intended for liability to be determined solely by the library user's fair use, Congress could have done so far more simply than in the complexity of §108.

That there may be substantial confusion about these issues is not surprising. Neither §107 nor §108 speaks to the would-be photocopier with the sometimes-useful clarity of statutes with quantitative measures. How can ordinary users clearly understand the §§107-108 issues when scholars and specialists dispute them, and this report treats them at length?

Of course, there is substantial non-compliance with even precise laws. Compliance is easier to measure against fixed quantitative standards. It may be that the sort of negotiations which have led to the music, classroom, CONTU, and off-air guidelines, and the Music Library/Music Publishers Associations' proposed statutory modification, each of which speaks with a quantitative precision that the statute does not, occur only when both sides perceive that quantitative standards serve their interests.

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17. See, Chicago Hearing at 31 and 209.



It is sometimes suggested that the absence of specificity in the provisions of section 108 serves the purpose of those who desire virtually no restraints on copying. While no witness or commentator said precisely that, the statement of one librarian, Meredith Butler of the Association of College and Research Libraries, is instructive:

I would argue for less rather than more specificity  
[in the law] on the assumption that what is not  
expressly forbidden may be permitted.<sup>18/</sup>

This assumption, although technically correct,<sup>19/</sup> misses the point. The copyright law expressly forbids the copying — by photocopying or otherwise -- of copyrighted material, unless the copying is done or authorized by the copyright owner.<sup>20/</sup> Section 108 permits behavior, in certain specified instances, which would be against the law in the absence of that section. Simply put, a proper analysis of §108, and the specificity it contains (or lacks), should start with the realization that what §108 does not expressly authorize is forbidden by section 106.

Ultimately, we believe, confusion with respect to the provisions of §108 and its relationship to §107 will be reduced. The question for 1983 and beyond is: will that clarification come through good faith negotiations among the interests concerned, or will it come from the bench?

This, too, is pivotal. Whether or not the ambiguities are deliberately exploited to avoid legal controls, the certain result is that until the law is clarified -- whether by statutory amendment, voluntary

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18. Chicago Hearing at 34.

19. It is a fundamental principle, made manifest in the Ninth Amendment, that people may do whatever they please, provided that neither a constitutional statute nor the common law provide otherwise.

20. 17 U.S.C. §106 (1980).

guidelines, this report, or judicial decision -- so that all users and librarians can readily understand it, vast quantities of copying ostensibly forbidden by the copyright law will continue.

Although §108 contains a number of provisions addressing photocopying in different circumstances in different manners, there are general rules which govern all "108" transactions. Chief among them is the provision that the section, when it applies, authorizes the copying or distribution of "no more than one copy or phonorecord" at a time. This is not a blanket license to make single copies; it simply means that multiple copying is essentially never authorized by §108. Because the types of single copying which are permitted by §108 differ greatly, the analysis of what the law says, what the parties perceive it to mean, and how they behave thereunder occupy in the remainder of this section.

### 3. Copying for Libraries' Collections.

#### a. For the collections of copying libraries..

Among the "oldest" provisions in §108 (i.e., those which appeared earliest in the lengthy "revision" process) are subsections (b) and (c), which contain provisions concerning the copying of unpublished and, under certain conditions, published works for inclusion in library collections.

(i) Unpublished works. Subsection (b) is older, having first appeared, in somewhat different form (it was originally the complete §108), in 1965.<sup>21/</sup> It then provided -- as it does now -- for the facsimile reproduction, "for purposes of preservation and security," of unpublished works in the collection of the library or archives which does the copying.

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<sup>21</sup>. H.R. 4347, 89th Cong., 1st Sess. (1965).

The record upon which this report is based contains little evidence or other information concerning the preservation copying of unpublished works. At the Houston hearing, Ellen Dunlap, of the Humanities Research Center at the University of Texas, testified that her organization regularly copied "entire collections of especially valuable materials or especially heavily used materials."<sup>22</sup>/ Hers is the type of institution for whom §108(b) appears to have been designed: an archival collection of original manuscripts, papers, and the like, most of which are unpublished, and for which a rigorous preservation regime serves the needs of archives and scholars without affecting the interests of the owner of copyright, if any, in the copied works.

A small but perhaps important point of clarification should be made here. Archivists sometimes believe that older unpublished works which they acquire are not protected by copyright. This is not necessarily so: the unpublished works of an American author, however long dead, are protected by copyright until at least December 31, 2002.<sup>23</sup>/ While they may be copied in accordance with §108(b), they are not in the public domain.

Finally, of course, it should be understood that the copy prepared under the auspices of §108(b) is not for distribution to a library patron. There should be no suggestion that the right of first publication is somehow transferred from the owner of copyright in an unpublished work to the library or archive which has certain copying privileges per §108. Since the copyright owner has elected never to publish the work, that election must be honored by those who make preservation copies of the work.

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22. Houston Hearing at 132.

23. See, 17 U.S.C. §303.

For the same reason, there is no fair use copying permitted beyond that authorized by §108(b). As the legislative history of the current copyright law states:

[t]he applicability of the fair use doctrine to unpublished works is narrowly limited since, although the work is unavailable [unless it is deposited in an archival collection], this is the result of a deliberate choice on the part of the copyright owner.<sup>24/</sup>

(ii) Published works. Subsection (c), which first appeared in 1969, <sup>25/</sup> provides that under certain circumstances, librarians may make replacement copies of published works. These circumstances appear, at first blush, to resemble closely those under which subsection (b) copies of unpublished works may be made, but there are substantial differences. Under (c), as under (b), preservation goals are served. Here, however, copying is permitted not only for preservation purposes (in the language of (c), for replacing "cop[ies] ... that [are] damaged [or] deteriorating") but also to replace copies which have been lost or stolen. And before doing any copying under (c), a library must make a "reasonable effort" to obtain "an unused replacement... at a fair price." Thus, in the case of published copyrighted works, a library must replace damaged, deteriorating, lost or stolen copies thereof by buying unused replacements if they are available at a fair price. If such replacement copies are not available, then (and only then) may photocopying be done to create the replacement copy.

The level of effort required to determine the availability of unused replacements was set out in statutory language in the 1969 bill, but is now found in the legislative history:

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24. S. Rep. No. 473 at 64.

25. S. 543, 91st Cong., 1st Sess. (1969).

The scope and nature of a reasonable investigation to determine that an unused replacement cannot be obtained will vary according to the circumstances of a particular situation. It will always require recourse to commonly-known trade sources in the United States, and in the normal situation also to the publisher or other copyright owner (if such owner can be located at the address listed in the copyright registration), or an authorized reproducing service. <sup>26/</sup>

Subsection (c), like subsection (b), has created few problems for the proprietary or library communities, but for rather different reasons. First, the copying authorized by (c) appears very close to legitimate fair use. While, concededly, the entire work is copied, there is little effect on the market for or value of the work since the copyright owner has stopped making unused copies of it available at a fair price. And, of course, there is no proliferation of copies: the library has presumably initially paid the copyright owner for the copy which is deteriorating, damaged, lost or stolen, and, after the copying is performed, the library has one usable copy in its collection. Finally, most librarians probably agree with Ms. Wilcox, of MINITEX, who stated that, given the choice between an original or authorized reprint copy and a photocopy, no library would choose the photocopy, since it would be more expensive and more difficult to read. <sup>27/</sup>

As to whether a given price for an unused copy is "fair," there is likewise little dispute. It seems clear to the Copyright Office that if, for example, a book or periodical is available from its publisher, or from a dealer specializing in "remainders," or from a jobber or dealer in bulk issues of periodicals, the market price will be "fair" and must be

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26. H.R. Rep. No. 1476 at 75-76.

27. Chicago Hearing at 62.

met, if copies are available from such sources. If, on the other hand, the only unused copies are available at high prices from merchants specializing in rare or antique books, then copying may be authorized. A note of caution should be sounded, however: a high price is not definitionally unfair. Certain works, particularly those dealing with time-sensitive financial information, are available only at a price which one might fairly call "high." Should a copy of such a work be lost or stolen, it would have to be replaced by meeting the publisher's price as long as unused replacement copies were available.

(iii) "Reserve" copying. A phenomenon familiar to those who have recently attended a college or university, particularly at the graduate level, is the modern reserve collection, which consists largely of photocopies. Libraries have long had "reserve" collections; originally they contained reference and other works, selected by librarians and teachers, to which users could have access, but which could not be charged out and did not circulate. The advent of cheap reprography has changed such collections. Academic libraries, most of whom have such collections and where the overwhelming majority of reserve collections are located, <sup>28/</sup> a common practice has been to place on reserve not the book or journal from which students are to read, but a photocopy (or multiple photocopies) of the portions assigned or recommended. The legislative history indicates that this issue did not receive great attention during revision. Thus one is left with the statute alone for guidance.

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28. 91% of all such libraries have reserve collections; 74% of all reserve collections are in such libraries. KRT 2.16.

The point is often made -- and correctly so -- that this is a "fair use" issue since it is not addressed by §108.<sup>29/</sup> Nonetheless, because it concerns photocopies made or stored by and in libraries, and because there is some confusion and dispute concerning it, it is included here.

Testimony and comments from librarians show that some feel that reserve photocopying is authorized by §108, <sup>30/</sup> while many believe it is a "107" (fair use) issue. <sup>31/</sup> The most important reserve questions are:

- (1) What rules govern reserve collection photocopying practices, and, more particularly,
- (2) May multiple photocopies of a single work be made and placed on reserve?

The answer to the first question is that, because §108 does not address this question, reserve photocopying is legal only if authorized by the copyright owner or by §107. This answer also aids in answering the second question. The only time when multiple copying is clearly permitted under either §107 or §108 is multiple copying for classroom use, which is the subject of what are known as the "classroom guidelines."<sup>32/</sup> It is logical and proper to consider multiple reserve copying as closely akin to multiple copying for classroom use. And, indeed, some of the hearing wit-

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29. In oversimplified but accurate terms §108 deals with single copying under the following circumstances: preservation of unpublished works, replacement of certain copies of published works under certain conditions, certain copies which become the property of library users, copies made by users, and copies of audiovisual news programs.

30. See, 2 Washington Hearing at 6-7 (statement of Dean Schmidt); App. III, Part 2, at 1-3 and at 6.

31. See, Anaheim Hearing at 87 (statement of James Cox); NY Hearing at 65-67 (statement of Robert Wedgeworth); App. IV, Part 2 at 230-231.

32. These guidelines appear in the H.R. Rep. No. 1476 at 68-70.

nesses did.<sup>33/</sup> The portion of the classroom guidelines about which the parties disagree (at least with respect to reserve copying) are those concerning spontaneity and brevity. In "reserve guidelines" of their own, the AAP urges libraries to follow the classroom guidelines' provisions, while the ALA does not.<sup>34/</sup> The differences between the provisions in the parties' "reserve guidelines" could well be reconciled by agreement. At least one librarian commentator reported refusing to place the same photocopied material on reserve more than once, in compliance with the spontaneity requirement.<sup>35/</sup>

This seems a sound practice, since however urgent the need to place timely materials — in multiple copies — on reserve in one semester, there should be no reason why permission can not be obtained from the copyright owner before placing the same (or newly made) copies on reserve when the class is offered again.

Both the record of submissions and the King Report show that since 1978 many libraries have imposed rules concerning permissions or quantitative limits. Nearly 91% of all academic libraries have reserve collections. Of them, 68% state that the Copyright Act of 1976 has affected their policies or procedures, with the most common result apparently being a new requirement that faculty members vouch for the non-infringing

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33. See, Anaheim Hearing at 87 (statement of James Cox).

34. Compare, AAP, Photocopying by Academic, Public, and Nonprofit Research Libraries (1978), with ALA, Model Policy Concerning College and University Photocopying for Classroom, Research, and Library Reserve Use (1982).

35. App. IV, Part 2, at 231 (statement of Murray).



status of photocopies placed on reserve. <sup>36/</sup> Witnesses and commentators bear this out,<sup>37/</sup> as well as stating that this copying itself must now be done by the faculty member rather than the library staff. <sup>38/</sup>

Before 1978 there was essentially no control over reserve copying, <sup>39/</sup> but since then substantial and positive changes have been made. Reserve copying is governed by fair use rules. In considering fair use, one should always remember that Congress, in enacting §107, explicitly refused to enact a blanket non-profit educational exemption to the copyright law. As stated in the House Report, concerning the language ultimately used in §107:

A specific exemption freeing certain reproductions of copyrighted works for educational and scholarly purposes from copyright control is not justified.<sup>40/</sup>

A library will always be in compliance with the law if it ensures that permission has been obtained for the multiple-term retention of multiple reserve photocopies.

(iv) The "Vanderbilt" exemption. The final area of copying for a library's collection which has serious "108" ramifications is the practice, authorized by §108(f)(3), of videotaping audiovisual news programs. Enacted to clear up all questions about the copyright status of Vanderbilt University's "news archives," this subsection has caused no

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<sup>36.</sup> KRT 2.16 and surrounding text.

<sup>37.</sup> See, e.g., Chicago Hearing at 39; Anaheim Hearing at 86-87; and App. V, Part 2 at 53-54.

<sup>38.</sup> See, e.g., 2 Washington Hearing at 6-7 and 22-23.

<sup>39.</sup> See, Houston Hearing at 84-85.

<sup>40.</sup> H.R. Rep. No. 1476 at 66-67.

dispute of which the Copyright Office is aware.<sup>41/</sup> Libraries meeting the criteria set out in §108(a) may make and lend (but not give, permanently deposit elsewhere, or sell) a limited number of copies of news programs. The King Report shows that 2.6% of all libraries avail themselves of this privilege.<sup>42/</sup>

The scope of "fair use" with respect to such copying depends largely upon the nature of the organization seeking it. A "108" library, having exhausted the quantitative limits implicit in the phrase "limited number of copies," should be permitted to make few fair use copies thereafter. But it might be able to make some, as might even a "non-108" library,<sup>43/</sup> on the grounds that news reporting in any medium, although eligible for copyright, must be subject to somewhat less stringent proprietary control than other forms of authorship.<sup>44/</sup>

b. Copying for Transfer to the Collections of Other Libraries.

Some of the copying authorized in the subsections just discussed may also be done even if the copy is ~~transferred~~ to the collections of other libraries. The discussion which follows examines whether and how such transfers may take place with respect to each of the types of copying previously examined.

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41. Prior to its enactment, a commercial television network had sought a judgment against Vanderbilt on the ground that its off-air taping of news programs was an infringement of copyright.

42. KRT 2.23.

43. A "non-108" library is one not meeting the eligibility criteria in subsection (a), either because it is not open to a broad enough class of users or because it derives an indirect (or perhaps even direct) commercial advantage from its copying.

44. See, e.g., Time, Inc. v. Bernard Geis Assoc., 293 F. Supp. 130 (S.D.N.Y. 1968).

First, however, an important point must be made. Notwithstanding the advantages of "resource sharing" and "increased patron access to information," no provision in §108 except those discussed immediately below authorizes the making of a copy (without the copyright owner's permission) for inclusion in another library's collection. Those ILL transactions countenanced by §108 must result in the photocopy becoming the property of the user, not the receiving library. <sup>45/</sup> The same is true of the copying of complete published works after a library has failed to find a copy (used or unused) available at a fair price to meet a user's request for materials.<sup>46/</sup> Thus, in many cases, since the transfers discussed below apparently do not occur with great frequency, the goals of sharing and access are realized by giving or selling a photocopy to a patron.

(i) Unpublished works. Manuscripts and the like, whose copying is authorized by subsection (b), may be made not only for "preservation and security" but also "for deposit for research use in another library or archives [which is open to a large enough class of patrons]." The sparse record concerning the utilization of this provision suggests that librarians and archivists avail themselves of its privilege so infrequently as to generate no controversy about it. Support for this hypothesis may be found in Ms. Dunlap's testimony, in which she indicated that institutions, including hers, which could copy unpublished works for deposit in other similar institutions usually elected not to do so. <sup>47/</sup> This appears to be done largely to prevent the proliferation of copies of rare and valuable materials.

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45. 17 U.S.C. §108(d)(1) (1980).

46. 17 U.S.C. §108(e)(1) (1980).

47. Houston Hearing at 131.

(ii) Published works. Copies made under the authority of subsection (c) will clearly be transferred to another library's collection when their purpose is to replace a lost or stolen copy of which the "victim" library does not have a duplicate of its own available for copying. In addition, if a library's copy of a published work is so badly damaged or deteriorated that a readable copy can not be made from it, then it may be lawful to transfer a replacement in the form of a photocopy to that library's collection, provided, of course, that a reasonable effort fails to unearth an unused copy at a fair price.

(iii) "Reserve" copying. As previously noted, the rules governing photocopying for reserve collections are found in and derived from §107. While perhaps no clear rule should be derived in respect of a law -- i.e., the law of fair use -- designed to be applied on a case-by-case basis, the Copyright Office believes that, in this context, a correct generalization about that doctrine leads to the conclusion that the act of receiving a photocopy from another library in order to (a) place it on reserve or (b) make multiple copies of it and place them on reserve is different from "in house" reserve photocopying. Permission should generally be sought before making multiple reserve copies of works when no "original" is owned by the library where the reserve copies will be stored. To say otherwise would be to permit a few originals in a few locations to serve as little more than camera-ready masters for the thousands of photocopy machines owned and operated by libraries.

(iv) The "Vanderbilt" exemption. As discussed above, copies of audiovisual news programs duly made in accordance with §108(f)(3) may be "distributed by lending." Congress, aware that inter-library "loan" often means inter-library transfer of copies, referred to ILL transactions

as "interlibrary arrangements," <sup>48/</sup> and must clearly here have meant "lending" in its literal sense: the temporary transfer of an item, without the passage of title, and subject to return to its owner. Thus, a copying library may lend a copy of an audiovisual news program to a patron or another library, but it may not sell or give it away permanently.

#### 4. Copying for Users.

The rules governing photocopying by libraries for their patrons are perhaps the most complex in section 108. First, subsection (d) sets out basic, but not simple, ground rules for the copying of periodical articles, contributions to copyrighted collections, and small parts of other copyrighted works. Then subsection (e) states more rigorous rules for the copying of entire works or substantial parts thereof. Finally, in subsection (g), rules governing all "108" copying, but having particular import here, are set out. The discussion which follows is set out in that order; by starting with (d) and ending with (g) one sees the full complexity of the regime set up by §108.

As to the effects of this regime on users, most librarians stated,<sup>49/</sup> and the King Report shows,<sup>50/</sup> that most users get copies of the works they want, i.e., that revision of the copyright law has had little effect on users' obtaining copies which they ask for. On the other hand,

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48. 17 U.S.C. §108(g)(2).

49. See, e.g., Chicago Hearing at 31 and 115-16; 1 Washington Hearing at 53); 2 Washington Hearing at 19; and App. IV, Part 2, at 85.

50. See, KRT 5.18 and 5.23.

some librarians stated that recordkeeping burdens,<sup>51/</sup> delays attributable to copyright reasons,<sup>52/</sup> restricted services,<sup>53/</sup> and a deterioration in librarian-user relations<sup>54/</sup> resulted from §108 controls on photocopying.

a. Subsection (d): periodical articles and small portions of works.

As everywhere else in § 108, the rules in subsection (d) apply to the making of one copy at a time. They apply to both "local" and "ILL" copying, i.e., to copying done by the library where the patron makes his request and to copying done at another library because the patron's library does not have a copy from which to make a photocopy.

Although much of the emphasis in the past, and in the record, is upon ILL photocopying, and some librarians state that they make photocopies only for ILL or reserve collections,<sup>55/</sup> the King Report shows that as between local and ILL copying, 72% of the photocopying transactions are local.<sup>56/</sup> Even among academic libraries, some of whose representatives state that they do no local photocopying,<sup>57/</sup> 56% of the copies prepared are delivered to at-the-site patrons or to other libraries within the same system. (At all other types of libraries, local transactions' share of the

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51. See, Chicago Hearing at 34, 46-47, 52, 115, 166; App. II, Part 2 at 132-3.

52. See, Chicago Hearing at 14.

53. See App. III, Part 2, at 55, 57-59.

54. See App. IV, Part 2, at 609.

55. See, e.g., Chicago Hearing at 156; and App. III, Part 2, at 1.

56. Calculated from KRT 3.10 which shows (albeit in percentage terms) 5.3 million ILL photocopy transactions and 13.7 million local photocopy transactions.

57. See, Chicago Hearing at 156.

photocopying market is larger than 56%). Of the types of works which are photocopied, "book transactions" result in local delivery of copies 78.2% of the time and "serial transactions," although they comprise the overwhelming majority of ILL photocopy transactions,<sup>58/</sup> are nonetheless 65.3% local.<sup>59/</sup>

Subsection (d) authorizes the preparation of photocopies, for patrons, of small portions of copyrighted works. As such, it looks similar to §107(3), which, concerning fair use, addresses the amount and substantiality of the copying in relation to the whole work. But, unlike the general provisions of §107, subsection (d) should be somewhat easier to understand and apply. It provides quantitative limits that are sometimes precise, ("no more than one article or other contribution to a copyrighted collection or periodical issue") and sometimes not, ("or... a copy... of a small part of any other copyrighted work.") (Emphasis added.)

With respect to periodicals, whose photocopying is at the root of much proprietor-library controversy, the rule is clear: up to one complete article, but no more. The same rule applies to copyrighted collections other than periodicals: up to one discrete contribution, but no more. This clarity disappears, however, with respect to works which are neither periodicals nor collections: a "small part" is, obviously, smaller than the "substantial part" of a work (whose copying is governed by the more stringent regime set out in subsection (e)), but where the boundary lies between them is a proper subject for case-by-case analysis, or, ideally,

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58. See, KRT 3.4(a).

59. KRT 3.10. These calculations are based on the ratio of "known" local to "known" ILL transactions.

for agreement among the parties, as in the voluntary guidelines already agreed upon for certain inter-library transactions, off-air taping, and the copying of music.

Some librarians find the "single article" provision burdensome. From their perspective, it appears that if a patron wants one article from each of three different issues of the same periodical, those may be photocopied and distributed in compliance with (d), while if he desires only two articles, but both come from the same issue, then such copying can not be done, at least in one transaction, under (d). <sup>60/</sup> Of particular concern are the publications of proceedings or symposia, wherein one issue contains several articles all about the same topic.

On the one hand, this is one area where §107 may have a significant role to play when §108 privileges have been exhausted. Thus, when a patron desires two articles from one issue of a periodical, the "nature of the work" consideration under fair use <sup>61/</sup> may include the recognition that the copying of one additional (i.e., "post-108") article from the proceedings or a symposium may be fair use. The copying of another additional "post-108" article should be guarded against; at this level the subsection (e) requirements to seek to buy a copy at a fair price (or, of course, to receive permission from the copyright owner to make the copies) should be invoked. On the other hand, it is not uncommon for a scholar or professional to buy single issues of periodicals to which he does not subscribe when they contain concentrated discussions of a topic in which he is

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60. See, generally, 1 Washington Hearing at 141 and 2 Washington Hearing at 29.

61. 17 U.S.C. §107(2).



interested, and the law should not be construed so as to discourage this practice.

Assuming that the copying to be done is of a single article or a small enough part of a work so as to qualify for (d) treatment, then the remaining rules are fairly straightforward. The library must have:

no notice that the copy... would be used for any purpose other than private study, scholarship, or research;

the photocopy must become the property of the user, and the library must prominently display, at the place it takes photocopy orders, and include on photocopy order forms, the warning prescribed by the Copyright Office:

#### NOTICE

##### WARNING CONCERNING COPYRIGHT RESTRICTIONS

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specified conditions is that the photocopy or reproduction is not be be "used for any purposes other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.

This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law. <sup>62/</sup>

In addition, the work from which the copy is made must be a published work.

As to having "no notice," although the legislative history of the Copyright Act is largely silent as concerns this phrase, it is a commonplace in statutes and is, or should be, well understood. The meaning of

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<sup>62.</sup> 37 C.F.R. §201.14.

notice has been explored and defined in many areas of the law, both decisional and statutory; and an exemplar can be found in statutory form in the Uniform Commercial Code:

A person has "notice" of a fact when

- (a) he has actual knowledge of it; or
- (b) he has received a notice or notification of it; or
- (c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists. <sup>63/</sup>

Our stress on notice here is based upon the problem created when for-profit "information brokers" use their agents or employees to obtain, via photocopying, copies of works -- particularly scholarly articles -- which are then sold for a profit to the brokers' customers. The term "information broker" covers firms with all levels of copyright compliance, ranging from those who obtain permission or pay for all copies they use to those who conduct their business, with no copyright permissions, by using the collections, staffs, and facilities of large academic and other libraries.

If a person seeking a photocopy (whether locally or via ILL) works for any information broker, then the purpose of the copying is not "private study, scholarship, or research." If the library has notice of such person's status, then §108 does not authorize the copying. As commercial copying of the most obvious type, §107 would likewise be unavailable, meaning that in the absence of explicit permission from the copyright owner, photocopying for "information brokers" is an infringement of copyright.

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<sup>63</sup>. American Law Institute, Uniform Commercial Code §1-201(25) (1978).

"Notice" of this type could be found in a variety of facts and circumstances, meaning that a library, to be safe, should take whatever steps necessary to ensure that it is not performing photocopying services for commercial "information brokers" unless they have clear permission from the owner of copyright.

The transfer of ownership of the copy to the user, another "(d)" requirement, simply means that libraries may not augment their collections by photocopying a work (or receiving an ILL photocopy), literally lending it to a user, and thereafter placing it in their collection. There seems to be no problem here since photocopies are poor substitutes for originals in terms of durability and, often, cost.

The rule concerning the warning likewise appears not to have caused any problems. By most accounts, the required language is used at the required places, and the record is devoid of any complaints to the contrary.

A problem of unclear proportion is suggested in the transcript of the Washington hearings. There an archivist declared that the copying privileges created by subsection (d) are available with respect to unpublished works.<sup>64</sup> The basis for this contention may be that subsection (d), unlike subsections (b) and (c), speaks only in terms of "copyrighted collection or periodical issue" and of "copyrighted works," rather than "unpublished" or "published" works, as do these subsections; and under present law, federal copyright attaches at the moment of creation, not publication.

The Copyright Office does not believe that Congress intended to permit libraries or archives to publish works when their copyright owners had chosen not to do so. As seen in the discussion of (b), supra, this choice

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<sup>64</sup>. Washington Hearing at 68 (statement of Dr. Carolyn Wallace).

should be honored; and no distribution to users, whether sought via §108(d) or fair use, should be permitted. A technical amendment of §108 which the Copyright Office proposes is that the word "published" be added when necessary in subsection (d) so as to make this indisputable.

b. Subsection (e): entire works or substantial parts thereof.

As noted previously, this subsection contains rules similar to, but ultimately more vigorous than subsection (d). The transactions that are covered involve the same participants: A library patron who requests a photocopy from a library and receives it either directly from that library (a local transaction) or from another library with which his library deals (an ILL transaction).

The difference is that "(e)" transactions involve the photocopying of entire works or substantial parts thereof. Again, the boundary between the "small part" governed by (d) and the "substantial part" covered by (e) is not a bright line clearly drawn in the statute. It is, rather, best left to resolution by the parties or, should that prove impossible, by the courts. When a transaction is within (e)'s scope, most of the rules which apply under (d) apply in the same manner:

- (1) one copy at a time;
- (2) the copy becomes the user's property;
- (3) the library has no notice that the copy would be put to any use other than private study, scholarship, or research;
- (4) the location where photocopies are ordered and the order form display the notice set out in 37 C.F.R. §201.14.

There are three differences, however, which are here identified, then discussed thereafter in reverse order: first, fair use has less, if any, applicability; second, the argument against permitting unpublished works to be copied is even stronger under this subsection than under (d); third, and most importantly, no "(e)" copying may occur until the library has first determined, on the basis of a reasonable investigation, that a copy... of the copyrighted work cannot be obtained at a fair price.

Treating this third, important difference first: although the burden is articulated differently ("reasonable investigation" in (e); "reasonable effort" in (c)), the Copyright Office is satisfied that the same duty is imposed in each case. The legislative history bears this out: the language in the history concerning this term is identical to that concerning the parallel provision in (c).<sup>65/</sup> The only difference here is that to obtain (e) copying privileges, a library must seek to buy used as well as unused copies of the work at a fair price, and fail to find any available. A "fair price" for a used copy should be analyzed based on the market for such works in a manner similar to the analysis of a "fair price" under (c).

Given that "commonly-known trade sources" must be consulted,<sup>66/</sup> it is clear that Congress believed and intended that this subsection cover only published works. There are, of course, no trade sources whatsoever for unpublished works. Again, libraries and archives simply should not

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65. Compare, H.R. Rep. No. 1476 at 76 [concerning (e)] with H.R. Rep. No. 1476 at 75-76 [concerning (c)]. The identity is somewhat surprising since the language about (c) speaks of "investigation" rather than "effort" (the latter term being the one used in (c)), while the language about (e) talks of "unused" copies; while the statutory text of (e) does not.

66. See H.R. Rep. No. 1476 at 76.

have the authority to publish works whose authors have chosen not to do so, and a technical amendment making it clear that subsection (e) applies only to published works should be enacted.

Fair use should have little if any applicability to "(e)" transactions when "(e)" privileges have been exhausted. Since the proportion being copied under (e) is large, and sometimes 100% of the work, little additional copying should be considered fair use.

Little concern with the text or use of subsection (e) appears in the record. Although the point was made with respect to replacement copies for a library's collections,<sup>67/</sup> it remains true that cost and quality considerations would almost always lead a patron seeking a copy to prefer a used or unused "original" to a photocopy prepared under (e).

c. Subsection (g): limits on §108 photocopying.

This subsection is the most complex provision in §108. Together with the reference to fair use in subsection (f)(4), it is the cause of much of the confusion and, thus, the disagreement surrounding §108. Unlike most of the subsections previously examined in this report, (g) provides rules not merely for one circumstance, such as photocopying to replace damaged or deteriorating works, but for all §108 transactions. It is designed to provide a limit, a "cap," to the copying which can occur under the preceding subsections by forbidding photocopying (otherwise permitted by §108) under two similar but not identical circumstances:

- (1) When the library or its employee "is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies... of the same material, whether made on one occasion or over a period of

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<sup>67/</sup> Chicago Hearing at 62 (statement of Alice Wilcox).

time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group"; or

- (2) when the library or employee engages in the systematic reproduction or distribution of single or multiple copies of periodical articles, contributions to copyrighted collections, or small parts of other copyrighted works, subject to a proviso permitting interlibrary arrangements (i.e., ILL photocopying) to continue so long as their purpose or effect is not to serve, for the receiving library, as a substitute for subscription to or purchase of the copied works.

The history of subsection (g) is inextricably linked with the whole revision process and the long history of the Williams & Wilkins case. The following is a chronology of its development:

- (1) 1969: What is now (g)(1) first appeared in December.
- (2) 1972: The Court of Claims Commissioner ruled in Williams & Wilkins that the United States had infringed certain copyrights.
- (3) 1973: The full Court of Claims reversed and held that the NIH/NLM practices were fair use.
- (4) 1974: Paragraph (g)(2), forbidding the systematic copying of (d) materials, was included in a revision bill.
- (5) 1975: The Supreme Court affirmed, by a 4-4 division and with no opinion, the Court of Claims' holding in Williams & Wilkins.
- (6) 1976: The proviso permitting certain ILL practices was added to (g)(2).

The difference between paragraphs (1) and (2) are important, but before looking at them it is necessary to look at the language preceding paragraph (1). There one sees that the "single copy" rule of subsection (a) is reiterated and amplified. Not only is multiple copying absolutely prohibited, but when the same work is "singly" copied more than once, on separate occasions, each transaction must be "isolated and unrelated." The

meaning of this phrase is not clearly spelled out in the legislative history, but paragraph (1), which was originally part of a unified subsection (g), offers guidance.

The test here is not a litmus paper test. "Related or concerted" photocopying and distribution of the same material is prohibited when the library is aware or has substantial reason to believe that it is engaging in such activities. The test is somewhat different from "notice." Awareness of or substantial reason to believe in a fact should be predicated on a subjective test of what a library (including its employees) knows about that fact, or should know about it, based upon events which take place on its premises.

There is no mathematical test for when repeated copying of the same material becomes concerted and related. Obviously, if more and more copies are made during any period of time, the copying becomes more and more related and concerted; but the test is not purely quantitative.<sup>68/</sup> A library's awareness of or reason to believe that such copying is occurring should not depend on whether the same or different employees have handled the orders or performed the photocopying. If records are kept of photocopying transactions, then a library can be fairly said to be aware of recurring requests for copies of the same work. Likewise, if a patron says to a librarian "I'd like a copy of the article that everyone in Sales is supposed to read," then the library should have substantial reason to believe that the proscribed level of copying is occurring, and should therefore refrain from further copying without permission from the copyright owner.

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<sup>68.</sup> See, 2 Nimmer on Copyright §8.03(E)(2)(i)(1982).



This second statement clearly requires some examination of how fair use applies to related and concerted copying. As previously discussed, the fact that §108(f)(4) states that fair use is not affected by §108, does not mean that "fair use" is a shibboleth whose invocation causes copyright liability to evaporate. Indeed, as suggested earlier, if certain copying would be fair use if performed by a patron, it is not necessarily true that libraries may conduct the same copying with impunity.<sup>69/</sup> That a patron's fair use is not the only issue to be addressed is made clear in the Senate Report, which states, with respect to (g)(1):

For example, if a college professor instructs his class to read an article from a copyrighted journal, the school library would not be permitted, under subsection (g), to reproduce copies of the article for members of the class.<sup>70/</sup>

Arguably, it would be fair use for several students to make such copies; the library, however, may not successfully invoke §108 to do so, because such copying by it would be "related and concerted."

It has been suggested that the Senate Report's language concerning §108 carries little weight because the House revisions of the section were adopted by the Conference Committee and ultimately enacted. The Copyright Office is satisfied that this is not correct. Two different rules of construction may be applied here. One involves language which is added by the last house of Congress to act on a given bill: there the later house's comments may receive precedence, particularly where they differ from the earlier house's comments and where those differences are based upon changes effected by the later house. In the case of §108, this means that the House and Conference Reports are of greatest weight in construing

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<sup>69</sup>. Cross reference to earlier discussion.

<sup>70</sup>. S. Rep. No. 473 at 70 .

§§108(f)(3), (g)(2), (h) and (i). Subsections (f)(3) and (h) were changed by the House, subsection (i) was added, and the ILL proviso was added to (g)(2).

A different rule applies to language used by the first house to act when it describes the effects of statutory language which survives intact through the rest of the legislative process. There the earlier house's words are of great importance, inasmuch as they were known to legislators acting later who, by leaving the statute intact, may be presumed to have agreed with its draftsmen's construction.<sup>71/</sup> This is the appropriate rule for examining subsection (g)(1), since the Senate's version, about which it made the comment quoted, supra, is the version which is now the law.

In the 108(i) review process, so much emphasis was placed by the participants on ILL transactions, which are governed by (g)(2), that there is little comment on the record about what subsection (g)(1) is perceived to mean or how it is applied in practice. Many librarians do state, however, that there should be no library liability if a patron has fair use privileges.<sup>72/</sup>

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71. See Hawkes v. Internal Revenue Service, 467 F.2d 787 (6th Cir. 1972); Getman v. N.L.R.B., 450 F.2d 670 (D.C. Cir. 1971).

72. See 2 Washington Hearing at 34-35, (statement Suzanne Murray); See also Chicago Hearing at 160-161 (statement of Harriette Cluxton); Anaheim Hearing at 58; App. III, Part 2, at 53.

The Copyright Office does not agree and, as explained above, believes that related and concerted copying of which the library is aware or has substantial reason to believe it is doing is prohibited, without regard to whether the user could successfully invoke a fair use defense to an action for copyright infringement.

Two supplemental points should be made. First, if this interpretation is correct, then librarians are put into a difficult position, largely due to the unclear relationship between §§107 and 108. Increased clarity may be obtained in three ways: legislative change, agreements by the parties, or court decisions. If Congress acts on any proposals to amend §108, either by its action or in the accompanying legislative history, the way in which fair use interacts with the various provisions of §108 could be made clearer. Likewise, the agreements which led to the previous "guidelines" serve as a model which Congress expressed hope would lead to mutually acceptable resolutions of fair use related disputes.<sup>73/</sup> And, of course, if all else fails, courts can provide clarity in construing complex statutes.

Second, the record's lack of (g)(1) testimony and comment may suggest that ILL, (g)(2), and "systematic" copying (all discussed immediately, infra) are seen not merely as important issues but as the only issues concerning §108(g). If true, then (g)(1), which originally comprised all of the subsection, and, unlike (g)(2), applies to all "108"

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<sup>73</sup>. See, H.R. Rep. No. 1476 at 72, where the following language appears:

The Committee expresses the hope that if there are areas where standards other than [the classroom and music] guidelines may be appropriate, the parties will continue their efforts to provide additional specific guidelines in the same spirit of good will and give and take that has marked the discussion of this subject in [1976].

transactions, may not be playing its intended role. Certainly, few concerns about "related or concerted" copying were voiced by anyone.

Subsection (g)(2), on the other hand, has received abundant attention. Its first appearance in the revision process was apparently in response to the Court of Claims' holding that the large-scale, routine photocopying done by NIH/NLM did not infringe William & Wilkins' copyrights. Looking at the language in the Commissioner's and Court's opinions, it is reasonable to infer that Congress' action in introducing g)(2) in the legislation, coming on the heels of that decision, reflected a judgment that the copying there was "systematic" and that thus Congress was attempting to render it infringing.

The fundamental concern with respect to (g)(2) has been and continues to be the lack of statutory precision or common consensus about what copying is (and is not) "systematic." The meaning of that term has been vigorously debated since before the enactment of the statute, but not even the rudiments of agreement have emerged. The legislative history is helpful, but not dispositive.

The Senate Report contains three examples of systematic photocopying:

(1) A library with a collection of journals in biology informs other libraries with similar collections that it will maintain and build its own collection and will make copies of articles from these journals available to them and their patrons on request. Accordingly, the other libraries discontinue or refrain from purchasing subscriptions to these journals and fulfill their patrons' requests for articles by obtaining photocopies from the source library.

(2) A research center employing a number of scientists and technicians subscribes to one or two copies of needed periodicals. By reproducing photocopies of articles the center is able to make the material in these periodicals available to its staff in the same manner which otherwise would have required multiple subscriptions.

(3) Several branches of a library system agree that one branch will subscribe to particular journals in lieu of each branch purchasing its own subscriptions, and the one subscribing branch will reproduce copies of articles from the publication for users of the other branches.<sup>74/</sup>

These examples are useful, but as in all definition by example, they illustrate but do not rigorously define. Their utility is in no way diminished by the House's later addition of the ILL proviso to (g)(2). That proviso exempts from copyright liability such ILL photocopying as does not in "purpose or effect" allow the receiving library to receive "copies ... for distribution in such aggregate quantities as to substitute for ... subscription ... or purchase." It in no way affects the scope of "systematic"; it simply permits one type of systematic photocopying -- limited ILL photocopying -- to be carried out, (g)(2) notwithstanding.

When Congress revised the copyright law, "systematic" was understood to be a term of less-than-perfect precision. The Senate stated:

neither a statute nor legislative history can specify precisely which library photocopying practices constitute the making of "single copies" as distinguished from "systematic reproduction." Isolated single spontaneous requests must be distinguished from "systematic reproduction." The photocopying needs of such operations as multi-county regional systems must be met.<sup>75/</sup>

The House Report was perhaps more blunt:

[The] provision [proscribing systematic photocopying] provoked a storm of controversy, centering around the extent to which the restrictions on "systematic" activities would prevent the continuation and development

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<sup>74</sup>. S. Rep. No. 473 at 70. What, one may reasonably ask, is the meaning of last sentence of this quotation, ostensibly reflecting a sympathy with some inter-library cooperation, in the context of a stricture against systematic copying, especially since the ILL exemption in (g)(2) had not yet appeared in the legislation? A possible explanation is this sentence acknowledged a need which prefigured the later-appearing ILL proviso of (g)(2).

<sup>75</sup>. S. Rep. No. 473 at 70.

of interlibrary networks and other arrangements involving the exchange of photocopies.<sup>76/</sup>

The House therefore added the proviso, but did not discuss it extensively. The proviso's phrase, "such aggregate quantities as to substitute for a subscription to or purchase of a work," was stated to require:

the development and implementation of more-or-less specific guidelines establishing criteria to govern various situations.<sup>77/</sup>

Those guidelines, now known as the CONTU guidelines, were created, and appear in the Conference Report.<sup>78/</sup> In turning to a discussion of them, one may note the extent to which the CONTU-ILL guidelines process, although important, functionally preempted a previous congressional call for similar efforts in regard to all "systematic" copying:

The committee therefore recommends that representatives of authors, book and periodical publishers and other owners of copyrighted material meet with the library community to formulate photocopying guidelines to assist library patrons and employees. Concerning library photocopying practices not authorized by this legislation, the committee recommends that workable clearance and licensing procedures be developed.<sup>79/</sup>

This language appears directly after discussion of the inability of a statute, and its legislative history, to make "systematic" clear.

Thus the CONTU guidelines, rather than addressing "systematic," are concerned only with the ILL "quantitative substitution" criteria. And they do not govern "various"<sup>80/</sup> situations, as the House had intended; they

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76. H.R. Rep. No. 1476 at 77-78.

77. Id. at 78.

78. Conf. Rep. No. 1733 at 72-73.

79. S. Rep. No. 473 at 70-71.

80. See text at fn. 82, supra.

deal explicitly only with the ILL photocopying of materials less than five years old at the time of the photocopying. Briefly stated,<sup>81/</sup> the CONTU guidelines provide as follows:

1. The guidelines, reached by an agreement of the principal library, publisher, and author organizations are intended to cover:

the most frequently encountered interlibrary case: a library's obtaining from another library, in lieu of interlibrary loan, copies of articles from relatively recent issues of periodicals — those published within five years prior to the date of the request.<sup>82/</sup>

2. The meaning of the (g)(2) proviso as to works more than five years old is left open to later interpretation.

3. The guidelines do not apply to entities which exist to make and distribute photocopies from a central source.

4. As to periodicals less than five years old, the "aggregate substitution quantity" is six or more copies of one or more articles from a given title during a calendar year.

5. As to other "(d)" materials, the proscribed quantity is six or more copies from a work — as long as it is in copyright — during a calendar year.

6. If a library owns or has ordered a subscription to a periodical or a copy of other "(d)" materials, but the works are not available, then the copying shall be treated as "local" rather than ILL.

7. A library may only request a photocopy in lieu of interlibrary loan if it could have, in accordance with 108, supplied such a copy to a patron from materials in its own collection.

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81. Their full text appears at Chapter II.

82. Conf. Rep. No. 1733 at 72.

8. Supplying libraries may not fill requests which are not accompanied by representations that the requesting library is complying with these guidelines.

9. Requesting libraries must maintain records of the disposition all requests governed by the guidelines. These records must be retained until the end of the third calendar year after the year in which the request was made.

10. This report shall review the guidelines.

The numbered paragraphs here set out are not the same as the five CONTU guidelines. The above-numbered "CONTU points" are laid out in this manner so as to bring attention to several provisions, particularly in the Introduction to the guidelines, which may not be widely understood.

The copying of recent periodicals received great emphasis in the CONTU process; hence, the five-year rule. But, as the King Report shows, there is substantial ILL photocopying activity with respect to older works.<sup>83/</sup> Unfortunately, CONTU's desired "future interpretation" concerning such works has not occurred, and there are signals, given the sometimes-heard notion that what §108 does not explicitly prohibit is permitted, that the explicit guideline concerning recent materials is sometimes construed to mean that the duration of copyright is five years, rather than 75 years or 50 years after the death of author as provided in the law.<sup>84/</sup> The record is replete, for example, with statements by librarians that the

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83. Of the ILL transactions examined in 1981, 53.1% of the "year reported" requests were for materials more than 5 years old (KRT 3.3(b)); while of the serial ILL transactions, 37.3% of the "year reported" requests were for such "older" materials. (KRT 3.4(a)).

84. See, 17 U.S.C. §§302-34 (1980).



copying of periodicals more than five years old should be unrestricted.<sup>85/</sup> Indeed, there appears to be an impression on the part of some librarians that there are presently no restrictions with respect to the copying of such materials. As put by one librarian:

Unlimited copying privileges should be accorded to persons copying from periodicals more than five years old; were copyright protection restricted to periodicals two years old, interlibrary loan record keeping would be simplified and access to information eased.<sup>86/</sup>

Such a view implies, of course, that copyright is thus perceived now to extend to only the first five years after publication, during which time the CONTU Guidelines, with their recordkeeping requirements, apply.

Another comment shows that even when copyright is recognized in works more than five years old, the fact is sometimes missed that (g)(2) and its proviso, unconstrued by the CONTU guidelines, applies to ILL transactions:

We believe that periodicals more than five years old should continue to be treated as they have been in the past, within the limits of fair use and without arbitrary restrictions on usage.<sup>87/</sup>

Thus the five-year portion of the CONTU guidelines, although felt by many to be appropriate, may have had the effect of creating the false impression that the term of copyright is no more than the scope of the guidelines.

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85. See e.g., Chicago Hearing at 163 and 174; 2 Washington Hearing at 10, Anaheim Hearing at 57; App. II, Part 2, at 199, 224, 247; App. III, Part 2, at 40, 41, 54.

86. App. VII at 8.

87. App. VII at 10. (Emphasis added).

The "rule of five" (copies per year) is felt by many to represent little more than sound management practice,<sup>88/</sup> since, given the costs attendant to ILL photocopy transactions, subscribing rather than buying ILL photocopies may well become cost effective at a number close to five per year. And, of course, the quantitative limit of five does not apply to ILL requests made by libraries which have entered subscriptions to the works of which a patron desires a copy.

In order to exercise ILL privileges in accordance with §108, the CONTU guidelines require that requesting/receiving libraries make a specific representation concerning copyright compliance and keep records for at least three years after the year in which the request is made. The King Report shows that compliance with this requirement is good to excellent;<sup>89/</sup> librarians generally state that the recordkeeping is a bearable if burdensome task. The American Library Association, in October of 1977, published an ILL form, with instructions, which was intended to meet the requirements of representations on the part of requesting libraries and of standards of record retention in the CONTU guidelines.<sup>90/</sup> It contains a provision which states as follows:

Request complies with

☐ 108(g)(2) Guidelines (CCG)

☐ other provisions of copyright law (CCL).

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88. See Chicago Hearing at 174 (statement of William Budington).

89. KRT 2.18.

90. Published in American Libraries, October, 1977, at 492-B and C. Reproduced in this report in Appendix II, Part 7, at 251.

The instructions in the form make it clear that the first box is to be checked if the "rule of five" is being followed or if a subscription to or purchase of the desired work has been made. This comports with CONTU guideline number three ("CONTU point" number 8) in that the requesting library is representing that the request is "made in conformity with these guidelines."

Controversy has developed about the remaining option. Some publishers believe that the choice presented is insufficiently diverse in that a librarian is asked essentially, "For which of two reasons is this photocopying transaction lawful?" Two points can be made about this concern. First, the instructions direct the requesting library to check the second box in a variety of "non-guidelines" cases, i.e., those which are not ILL transactions involving the copying of "(d)" materials less than five years old. As such, the statement, "complies with the copyright law" may be perfectly proper and, when it is, that box should be checked. But, we believe, the full regime inherent in §§ 106-108 of the copyright law should be manifest on the form. That is, consideration of the total proscription on systematic copying except in certain ILL transactions and of the general proscription on related or concerted copying could be stated in conjunction with boxes labelled "permission received from copyright owner" and "copying royalty fee paid."

We say this because we believe that requiring such entries would clarify understanding of the admittedly complex provisions of law, not merely on the part of national leaders and specialists debating the law, but on the part of on-the-firing-line librarians who are charged with applying the law day to day. The levels of confusion manifested throughout the record with respect to the relationship of sections 107 and 108 and the

rules in subsection (g) might well be reduced by changes of the type suggested. Of course, it would be far better if the parties could agree on how a "compliance representation" form should read, but, at least during 1982, agreement on this issue seemed unattainable. The gap between what we believe to be a workable, if complex, scheme, on the one hand, and the deficiencies in practice, on the other, would be narrowed if the daily ILL transactions, and the form used there, continuously lead the librarians to a clearer understanding of the requirements of the law. A form of the type here recommended would require the authorized agent of the requesting entity to begin by thinking not "Which justification for photocopying shall I present to the supplying library?" but rather: "Is this copying lawful and what is the source of the authorization to make the photocopy?"

This discussion of "systematic" copying and the rules under (g)(2) has, like the record and the parties' debates, thus far been dominated by ILL consideration. That emphasis is now concluded; one should not lose sight of the fact that to consider only ILL transactions when analyzing (g)(2) is to let the proviso tail wag the systematic dog. To avoid that error, the rule in (g)(2) is repeated: all "systematic" photocopying is forbidden except such ILL photocopying as the proviso permits, i.e., such ILL photocopying as does not amount to the receiving library's substitution for subscription or purchase.

As shown earlier, the legislative history contains some examples of "systematic" photocopying, but no rigorous definition. And the parties have failed to arrive at an understanding concerning the term, notwithstanding the Senate's call for them to try to do so. In some respects, this is understandable, since all "systematic" copying is against the law except the "non-substitutional" ILL copying permitted by the proviso.

Giving meaning to the term, although difficult, is not impossible. Obviously, the dictionary helps.<sup>91/</sup> Its references, in the definitions of "systematic", to the word "system" leads one to such phrases as "subject to a common plan," "regular interaction," "a group of devices... forming a network," "an organized or established procedure," and "an organization or network for the collection and distribution of information."<sup>92/</sup>

And, of course, by enacting the proviso to permit ILL photocopying, Congress showed the need to restrict the operative effects of §108(g)(2),<sup>93/</sup> i.e., that because ILL photocopying is systematic, it is lawful only because the proviso says so.

These observations lead to a somewhat better understanding of the meaning of (g)(2). First, there must be a system. The test is objective; unlike (g)(1), when subjective awareness triggers a library's liability, here the creation of the system is enough to render all copying done via that system infringing, unless authorized by the copyright owner. The definitions lead to the observation that the greater the commonality of a plan, the more regular the interaction, the more organized the network or procedure, then the more likely it is that the copying done is "systematic." Clearly, photocopying in an environment as organized as an ILL network, but of a "local" nature, or beyond the (g)(2) limits if the copying is of the ILL type, would be systematic.

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<sup>91</sup>. See, e.g., Institute for Scientific Information v. U.S. Postal Service, 555 F.2d 128, 130 (3d Cir. 1977), citing Houghton v. Payne, 194 U.S. 88 (1904). In Houghton, the leading case interpreting the difference between "books" and "periodicals," the Supreme Court, in the absence of statutory definitions, used Webster's Dictionary to assist in the construction of the words "periodical" and "magazine."

<sup>92</sup> . Webster's Third New Int'l Dictionary 2322.

<sup>93</sup> . 2A Sutherland on Statutory Construction §47.08 (1973).

In practical terms, the extent to which library photocopying services are large-scale operations, with full time photocopying staff, advertisements soliciting patronage, and consistently substantial output, bear directly on the extent to which such services are "systematic."

The extent to which the "(g)" rules -- both (g)(1)'s proscription of related or concerted photocopying and (g)(2)'s general proscription of systematic copying -- are seen by some to have been swallowed up by the proviso to (g)(2) permitting certain ILL activities may be seen in the inferences drawn in a law review article entitled "Library Photocopying."<sup>94/</sup> There the author extrapolates from the "rule of five" in the CONTU guidelines to reach the conclusion that a library may photocopy, for its own patrons, works to which it does subscribe or does own at the rate of twenty-five copies per year, in the case of works circulated for two-week periods, and twenty-five copies per week, if works are on reserve and do not circulate. These quantities are based on an interpretation of the phrase in the proviso to (g)(2) concerning quantities substituting for subscription or purchase. Such an interpretation, which likely has received wide circulation,<sup>95/</sup> ignores two crucial points:

- (1) the "quantitative substitution" language in the proviso to (g)(2) applies only to interlibrary arrangements -- all other "systematic" photocopying is forbidden -- without regard to quantities -- by the portion of (g)(2) before the proviso; and
- (2) The proscription of related or concerted photocopying contained in (g)(1) should render the inferred permissible quantities of photocopying unlawful whether (g)(2) existed or not.

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<sup>94</sup> . Treece, J., 24 U.C.L.A. Law Review 1025, 1054-55 (1977).

<sup>95</sup> . It appeared in a "symposium issue" of the U.C.L.A. Law Review which was devoted to the then new Copyright Act of 1976.

Notice that (g)(1) and (g)(2) are connected by the word "or" -- i.e., the privileges of reproduction under §108 are disqualified if copying is either "related or concerted" under (g)(1) or systematic under (g)(2) (unless, in the latter case, the ILL exemption applies. The (g)(2) proviso, containing that exemption, does not shelter anything but ILL transactions.

Three final points concerning "systematic" copying merit attention: they concern (1) "local" copying, (2) multiple copy transactions, and (3) technological developments, both present and future. The first question involves how the term "library" should be interpreted with respect to "parent" libraries and their branches. If a "parent" with three branches is treated as four libraries, then the ILL rules, including subsection (g)(2) and the CONTU guidelines would permit some transfers, among the branches, of photocopies of "(d)" materials for ultimate transfer to users. There is some evidence of record that some librarians believe that by treating such transaction as "non-ILL," (by treating the system as one library) then the quantitative ILL limits do not apply and there are fewer restrictions.<sup>96/</sup>

The Copyright Office believes such an interpretation to be wrong. Separate libraries may exercise ILL privileges among themselves within the boundaries established by (g)(2). But, by treating a system as one "library," although it is correct that the proviso and guidelines do not apply (there can not, of course, be "interlibrary arrangements" "between" one library), this should not be taken to mean that there are no restrictions. Indeed, as seen before, the law appears in such circumstances to be

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<sup>96</sup> . See, Chicago Hearing at 23 and 152-53; App. II, Part 2, at 186.

more restrictive, since the full prohibitions on concerted, related, and systematic photocopying apply and no proviso exists which concerns non-ILL transactions.

Whatever the confusion about the meaning of the terms used in (g), the King Report shows that, when works bearing a copyright notice are photocopied, some 10.5% of the transactions result in the preparation of more than five copies.<sup>97/</sup> Since the preparation of more than one photocopy at a time is never permitted by § 108, this incidence of substantial multiple copying seems high. The impact of the presence of the copyright notice on copied works is suggested in the table: when no notice appears, 15.7% of the transactions result in the preparation of more than five copies. This suggests that if no copyright controls appear to exist,<sup>98/</sup> libraries prepare six or more copies in roughly three of every twenty transactions; the effect of copyright appears to be rather less than one might expect: six or more copies are made of works bearing a copyright notice in roughly two of every twenty transactions. The emphasis on single copying inherent in all of § 108, together with the librarians' report that in only 1.1% of all transactions do they pay for or receive free authorization to photocopy from copyright owners, suggests that the balance so carefully struck by the language of § 108 is being strained by multiple photocopying.

A conservative estimate of the annual revenues foregone by publishers by virtue of unauthorized multiple photocopying is around \$38.6 million.<sup>99/</sup> The estimate is conservative because:

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<sup>97</sup> . See Table K2 in Chapter V of this report.

<sup>98</sup> . A work lacking a copyright notice is either in the public domain or its copying by an "innocent infringer" will subject such copying to substantially reduced penalties. See, 17 U.S.C. §405 (1980).

<sup>99</sup> . This was calculated by determining the number of copies prepared in transactions in which the copyright notice appeared on the work which



- (a) it does not consider the revenue foregone for multiple-copy transactions involving the unauthorized preparation of fewer than five copies at a time,
- (b) it does not consider the revenue foregone for any single copying which is concerted, related, or systematic (and not permitted by the proviso), and
- (c) it assumes that all of the transactions tabulated in Table K1 a range of copies per transaction (such as 16-20) were of the smallest number in that range (in this example, 16).

The revenue here is described as foregone rather than lost since it is clear that publishers often grant permission to make photocopies without charge.<sup>100/</sup> And, although \$38.6 million may not be much if spread across the entire publishing industry, it becomes significant when one realizes that in 1980 SST journal publishers received almost 70% of all photocopying royalty revenues<sup>101/</sup> (which comports with the belief that their works are the most heavily photocopied) and that such publishers had mean total revenues of \$602,000 in that year.<sup>102/</sup>

Finally, the technological developments discussed elsewhere in this report<sup>103/</sup> will permit high speed, inexpensive, fully automated access to copyrighted materials. When such progress creates completely new modes of access -- as by CRT display of the full texts stored in computerized data bases or optical disks -- then full copyright liability should attach.

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 was copied, and in which five or more copies were made. Each copy was then assigned a "foregone royalty" equal to CCC's 1982 average per item royalty rate of \$1.87.

100. [X-ref to King & Transcript].

101. See KRT 4.11 and 4.16. SST journal publishers received \$665,000 of the \$961,000 in photocopying royalties received by all serial publishers; publishers who published no serials received less than \$35,000 in such royalties. (These are industry totals, not means or averages).

102. KRT 4.9.

103. See, text infra, VI.

Neither worked with an SFP library. Neither could answer questions concerning practices in such libraries. A formal, clear presentation from the SLA concerning not only "supervised," but also concerning "direct or indirect commercial advantage" and "systematic" is unfortunately absent from the record. While no formal "missing witness" rule applies to our hearings, the absence of clear testimony has left the record in these areas somewhat one-sided. We understand the SLA's general position to be that §108 speaks in terms of "libraries" and does not make the distinctions urged by the AAP. We are not certain that the issue is as simple as either side proposes, but, as discussed earlier,<sup>107/</sup> we believe the law does make distinctions among libraries according to their relationship with profit-seeking entities.

With respect to "supervision" in SFP libraries, the Copyright Office believes that an employee's use of a photocopy machine in such libraries is likely to be "supervised," even if he is using the machine on his own initiative provided his copying is job-related. There is a small but important body of copyright law suggesting this result, either on the theory of respondeat superior<sup>108/</sup> or on a broader "doctrine of related defendants." As to the latter, the leading treatise states:

Even in the absence of an employer-employee relationship one may be liable as a related defendant if he has the right and ability to supervise the infringing activities and also has a direct financial interest in such activities.<sup>109/</sup>

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107. See, text supra, III A(4) and (5).

108. Shapiro, Bernstein & Co. v. Veltin, 47 F. Supp. 648 (W.D. La. 1942); Buck v. Newsreel, Inc., 25 F. Supp. 787 (D. Mass. 1938).

109. 3 Nimmer on Copyright §12.04[A] at 12-37, citing several cases in fn. 18.

And, as the recent Sony case has shown, "it is not necessary that an alleged contributory infringer has actual knowledge that the activity which he makes possible constitutes copyright infringement."<sup>110/</sup>

Copying done by corporate employees, within the scope of their employment, and in furtherance of the corporate mission (thus meeting the "direct financial interest" standard) likely is, for §108 purposes, "supervised." Thus, if it is infringing (because it is not authorized by §107, §108, or the copyright owner), the parent company is liable for infringement.

"Supervision" in non-SFP libraries raises different questions. We assume, for the most part, that patrons in such libraries are less likely to be employees of the entity which owns or runs the library than is the case in SFP libraries. Here, therefore, the issue is less complex. In the absence of an employer-employee relationship (or any other facts giving rise to library liability) then the question is, simply, does the library or its employees supervise the patron copying activities. When a patron takes a book or periodical off the shelf, or receives it after ordering it at a desk, and thereafter photocopies it, such copying is unsupervised unless the library or its employees exercises some control over it. This is not, however, carte blanche for libraries to immunize themselves from liability by diverting arguably infringing copying to machines used by patrons.

A patron who prepares copies completely on his own is making the type of "unsupervised use" to which §108(f)(1) is directed. He obtains no immunity for himself under (f)(1) (as may the library) or, indeed, under

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<sup>110</sup>. Id. at 12-34, citing Universal City Studios, Inc. v. Sony Corp. of America, 659 F.2d 963 (9th Cir. 1981), cert. granted, 50 U.S.L.W. 3973 (1982).

any of §108. If his copying is within the scope of fair use, by virtue of §107 he has no copyright liability; if his copying "exceeds fair use" (§108(f)(2)), he will be liable. If, however, he first asks a library to perform photocopying of an extent which would not be fair use (if performed by him), and the library responds, "we can not do that for you, but you should use that machine over there," then the copying he performs may well be "supervised," thus making the library liable, along with the patron.<sup>111/</sup> The test is one of fact: did a library exercise sufficient control over the patron's activity to make the copying "supervised." As elsewhere, questions of fact are resolved on a case-by-case basis, but the adoption of agreed-upon rules could go a long way toward setting the framework for such decisions, while at the same time decreasing the uncertainty inherent in any lawsuit.

To recapitulate: libraries, whether associated with profit-seeking organizations or not, may receive immunity from liability for the unsupervised infringements of their patrons. The question whether a given use is supervised will depend on the totality of the circumstances, and the answer will depend, among other things, upon whether the copying patron is an employee whose conduct is within the scope of his employment. If a use is, in fact, unsupervised, the final issue raised by (f)(1) is whether the equipment displays the required notice.<sup>112/</sup>

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111. See, generally, the discussion of vicarious liability in 3 Nimmer on Copyright §12.04 (1982).

112. This notice is not the same as the one promulgated by the Copyright Office in implementing §108(d)(2) and (e)(2); it is simply "a notice that the making of a copy may be subject to the copyright law."

Librarians reported that almost 93% of the coin-operated machines on their premises bear the required notice.<sup>113/</sup> While unsupervised uses of non-coin-operated machines may occur, this measurement indicates good compliance. Testimony and comment letters also reflected high rates of compliance.<sup>114/</sup> Library patrons whose photocopying activities were actually examined were using machines bearing a notice 83% of the time.<sup>115/</sup> The language of (f)(1), in which the notice requirement appears in a proviso, means that libraries are liable for even the unsupervised infringements of patrons who make their copies on machines without the notice.<sup>116/</sup> If 17% of the machines used by patrons lack such notice, then potential library liability for patron activities may be higher than one would expect.

At all events, the warning serves to protect libraries from liability. A comment that the warning caused a public relations problem and required staff time to explain its meaning to resentful patrons<sup>117/</sup> suggests some misunderstanding in this regard. Likewise, the testimony of a publisher that, upon asking a librarian the meaning of a posted warning, he was told "Don't worry about it,"<sup>118/</sup> suggests a less than full understanding of the law. Indeed, if a library does indicate to patrons that the warning is meaningless, then either the copying done thereafter should be

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113. KRT 2.10.

114. See e.g., N.Y. Hearing at 361 and App. VI, Part 2, at 124.

115. KRT 5.21.

116. [Sutherland on Provisos].

117. App. IV, Part 2, at 10.

118. N.Y. Hearing at 101.

regarded as supervised, or the notice should be treated, with respect to such transactions, as being absent. In either case, the library should share with its patron any infringement liability.

By far the better practice is the one described by Elizabeth Usher, a librarian, in response to a question concerning the propriety of the advice not to worry about the notice, in which she indicated that she would say to a user:

Read it and you will know that you are responsible for any copyright infringement.<sup>119/</sup>

An item of interest related to photocopying performed by library patrons is the extent to which those libraries least likely to have photocopy machines on their premises have such machines within walking distance, i.e., "down the hall, on another floor, within a building close by."<sup>120/</sup> Only 40.8% of SNP and 50.2% of SFP libraries have machines on their premises,<sup>121/</sup> but 73.4% of the SNP's and 94.1% of the SFP's have machines within walking distance.<sup>122/</sup> While copying which occurs physically outside the library is not, strictly speaking, "108" copying, it may have significant effects on the balance between creators and users.

Finally, with respect to user copying, the reasons given by patrons for the copying they do are interesting. They suggest that the implicit subsidy for educational purposes inherent in both sections of the law concerning photocopying, sections 107 and 108, may simultaneously serve as a subsidy for the business community as well. Although section 107, the

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<sup>119.</sup> See Id. New York Hearing at 285.

<sup>120.</sup> King Report at A-11.

<sup>121.</sup> KRT 2.3.

<sup>122.</sup> KRT 2.13.

law governing whether a patron's unauthorized photocopying is infringing or not, clearly favors "nonprofit educational purposes" over uses "of a commercial nature,"<sup>123/</sup> the statistics which are available show that much of the photocopying done by library patrons is described as being "necessary for their job" or "helpful but not necessary for their job."<sup>124/</sup> Indeed, if one considers photocopying related to teaching as job-related, then this was the reason given by more patrons than any other. Something between 35% and 40% of the patron photocopying appears to be done in furtherance of patrons' employment. Whether this level of "non-educational" copying is within the intended balance is unclear. What is apparent is that in an environment where much copying occurs, it is difficult to impose practical, enforceable distinctions as to those types of photocopying favored by the law and those disfavored. In an environment of greater copyright awareness, it could prove otherwise, but only a reduction in the levels of confusion and uncertainty previously discussed can lead to such an environment.

#### B. Copying Elsewhere.

In addition to the copying and distributing of material by libraries subject to §108, a great deal of photocopying and distributing is done by copy shops, commercial information brokers, and libraries that do not qualify for §108 status. This copying may have a significant effect on the balance between the rights of creators and the needs of users of copyrighted materials; for, in effect it raises a fundamental question: are

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123. Section 107(1).

124. See KRT 5.10 and 5.25.

the boundaries of the §108 privilege fair for the included beneficiaries and to the excluded users?

1. Copy Shops: including the Gnomon, Tyco, and N.Y.U. Cases.

In January 1981, the National Association of Quick Printers (NAQP) represented by Philip Battaglia, its Executive Vice-President, estimated that quick printers in the United States number approximately 15,000 and that growth had been about 25 percent per year. He divided these into three types: (1) full-service quick printers who do duplication, copying and typesetting; (2) instant printers who usually do only duplicating and copying; and (3) copy shops which do only photocopying.<sup>125</sup>/

The NAQP representative indicated that while convenience copying was widespread and an integral part of the industry, the majority of quick printers — shops that duplicate, copy and typeset — attribute only 7% of their business to so-called convenience copying, i.e. where the customer does his own copying and either pays a clerk or inserts coins in the machine.<sup>126</sup>/

The NAQP representative pledged the cooperation of quick printers with copyright owners but stressed that there were too many problems for the staff to police violations of the copyright law, especially since these problems often arose through a customer's violation of the copyright law without the printer's knowledge. He cautioned that if current suits against copy shops become widespread, the entire industry will suffer.<sup>127</sup>/

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125. New York Hearing at 203-205 (statement of Philip Battaglia).

126. Id. at 204-205.

127. Id. at 207.



In a typical transaction, Mr. Battaglia noted, the customer is given a written price quotation that includes a statement that copyrighted material can not be copied. Not every quick printer inserts the warning; and, even if the statement is in the price quotation, it is not clear that the customer's acceptance of the price quotation means acknowledgment of the warning.<sup>128</sup>/

Proprietors have expressed concern that library patrons frequently copy library materials by checking them out and having photocopying done at a nearby copy shop. During the regional hearings, most librarians either did not discuss the issue or indicated they were not aware of the existence of copy shops close to their facilities. Two witnesses, one from the University of Texas<sup>129</sup>/ and one from UCLA,<sup>130</sup>/ observed that there were flourishing copy shops close to their campus.

So far there have been three cases involving the unauthorized reproduction and distribution for profit of copyrighted material by commercial copy services. In Basic Books, Inc. v. Gnomon Corp.,<sup>131</sup>/ the defendant, a company engaged in photocopying, had several business locations. Most were near colleges and universities. Plaintiff alleged that Gnomon's photocopying of copyrighted material was without authorization of the copyright owner and infringed the copyright in those works -- regardless of any fair use or §108 privileges the user (or the library from which the material copied came) might have asserted. The terms of a consent decree

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<sup>128</sup>. Id. at 215-216.

<sup>129</sup>. Houston Hearing at 57 (statement of Neill Megaw).

<sup>130</sup>. Anaheim Hearing at 89-90 (statement of James Cox).

<sup>131</sup>. 1980 Copyright Law Decisions (CCH) para. 25, 145 (D. Conn. 1980).

required Gnomon to cease making multiple copies of the same copyrighted material for either the same or different persons without express permission from the copyright owner or a certification from a faculty member that the copying order is within established educational copying guidelines.<sup>132</sup> / Gnomon was also required to post a copy of those guidelines in a prominent position in each of its places of business.

In Harper & Row Publishers, Inc. v. Tyco Copy Service,<sup>133</sup> / a company that offered photocopying services to the public, but catered especially to college students, was charged with copying and selling excerpts from a copyrighted textbook without permission. In a consent decree, the same district court involved in Gnomon impressed the same restrictions on the copying of copyrighted material as in the earlier case.

Although the copyright owners prevailed in the Gnomon and Tyco cases, as one publisher observed these litigations consumed considerable resources, without recovery of either statutory damages or attorney's fees.<sup>134</sup> /

On December 14, 1982, nine publishers filed a copyright infringement suit in the United States District Court, Southern District of New York, against New York University (NYU), ten of its faculty members, and an off-campus copy center. This is the first suit charging a university and

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<sup>132</sup>. See H.R. Rep. No. 1476 at 68-70.

<sup>133</sup>. 1980 Copyright Law Decisions (CCH) para. 25,230 (D. Conn. 1981).

<sup>134</sup>. He noted, however, that the defendants were supposed to pay royalties. N.Y. Hearing at 42-43 (statement of Martin Levin).

some of its faculty with violating §§107 and 108 of the copyright law. Plaintiffs are asserting that copyrighted materials, books, or parts of them, are copied without permission and used as class texts.<sup>135/</sup>

## 2. Commercial Information Brokers.

In addition to services offered by NAQP members, some companies themselves sell copies of documents to the public. Generally these document delivery companies fall into two categories: (1) those that maintain large and extensive collections of materials from which to provide documents to the public, and those which do not, and therefore must procure the source documents before selling them to the consumer. The former are frequently larger operations than are the latter. By estimate, the second group presently handles about 70% of all document requests received by all non-library private sector suppliers.<sup>136/</sup>

This business is profitable and competitive. The King Report estimated that during 1980, libraries ordered 1,946,100 documents from commercial document delivery systems. Most of these documents, 1,879,400, were ordered by SFP libraries; 38,200 documents by academic libraries; and only about 7,100 by public libraries. The King Report found that in 1980 alone U.S. libraries spent approximately six million dollars on commercial document services.<sup>137/</sup>

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135. Harper & Row Publishers, Co. v. Squibb Corp., No. 82 Civ. 2363 (S.D.N.Y., settlement agreement dated November 19, 1972).

136. James Wood, Private Sector, Non-Library Document Delivery Services 2 (prepared for the Association of Research Libraries).

137. KRT 2.24.

### 3. Non-§108 Libraries.

Libraries that do not qualify for §108 limitations <sup>138</sup>/ are another source of copying. Despite the discussion found in the legislative history,<sup>139</sup>/ the dividing line between §108 and non-§108 libraries is still a matter of dispute.

The principal conflict concerns libraries in for-profit organizations: these libraries insist that they are eligible for §108 privileges since, unlike copy shops, the copying does not involve any direct commercial advantage;<sup>140</sup>/ and their collections are sufficiently open or available to the public to satisfy the other requirement of §108(a).<sup>141</sup>/ Proprietors argue that all copying by libraries in for-profit organizations requires authorization, except in instances where copying is isolated and unrelated to other copying.<sup>142</sup>/ Proprietors point to the CCC as the collecting vehicle through which for-profit organizations should pay for their copying.<sup>143</sup>/

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<sup>138</sup>. Libraries that do not meet the requirements of 108(a), either because they copy with the purpose of direct or indirect commercial advantage, or they are not open to the public. For the complete text of 108(a), see text infra, III A ( ).

<sup>139</sup>. See H. Rep. No. 1476 at 74-75.

<sup>140</sup>. See Chicago Hearing at 183-4, (statement of William Budington).

<sup>141</sup>. See Chicago Hearing at 181-6 (statement of William Budington); at 191 (statement of Beth Hamilton). Also see Houston Hearing at 15-26 (statement of Barbara Prewitt).

<sup>142</sup>. Chicago Hearing at 71 and 77-78 (statement of Charles Lieb).

<sup>143</sup>. Id. at 71-80.

The King Report estimates that in 1980 there were about 3,370 special for-profit (SFP) libraries in the United States;<sup>144</sup>/ King also estimates that about 19.8% of these SFP libraries make royalty payments on photocopies.<sup>145</sup>/ And, while the percentage of transactions on which payments are made is higher for SFP libraries than for any other type of library, royalties are only paid for about 0.5% of SFP transactions.<sup>146</sup>/ The AAP testified that few corporate libraries clear copying through the CCC, and those were probably not paying for substantial copying for which payments should be made.<sup>147</sup>/

The AAP and E.R. Squibb in recent months settled a dispute concerning Squibb's unauthorized and uncompensated photocopying of materials. The parties agreed upon a procedure for reporting and paying for photocopies of material from journals and other published material registered with the CCC. Central to the settlement was Squibb's agreement to register with the CCC as a user.<sup>148</sup>/ The AAP reports that the parties consider the procedure adopted to constitute a model for resolving some photocopying issues in companies with extensive research facilities.<sup>149</sup>/

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144. KRT 2.2.

145. KRT 2.22.

146. KRT 3.11.

147. Chicago Hearing at 72-76, 86-87 (statement of Charles Lieb). See also text infra, IV D(1)(b)(i) for the latest CCC data.

148. It should be noted that a similar settlement was reached earlier with the American Cyanamid company. Publisher's Weekly, May 14, 1982 at 114.

149. AAP Press Release, November 22, 1982.

### C. Copyright Proprietors.

The copyright law gives exclusive rights, including the rights to reproduce and to distribute a work, to "the copyright owner." This term broadly includes the particular owners of particular rights under a copyright.<sup>150</sup> / Section 108(i), however, refers to a "statutory balancing of the rights of creators, and the needs of users." [emphasis added]. It is apparent that, in addressing the question of balance, neither creators nor users, per se, have been heard from in quantity.

The situation with respect to creators is a special one. At all stages of consideration of literary photocopying questions, including this review, authors of literary works have been vigorously represented by the Authors League of America. Throughout, the League has been the principal vehicle for communicating the position of authors on the full range of copyright issues. The problem in representation arises only in relation to librarians' assertion that the authors of scholarly, scientific, and technical (SST) literature, have different attitudes toward the existence, ownership, and exercise of copyright in their works than authors of non-SST materials and that the League represents principally the latter class.

To be sure, many authors, especially contributors to SST publications, are individually often motivated primarily by advancing learning, gaining audience for their findings and views, and enhancing the reputation of themselves and their institutions. To these authors, usually employed, and often academics, income from publication is secondary, if relevant at all. In the case of academics, his or her publication record is usually relevant to appointment, and always to tenure; and that is the principal

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<sup>150</sup>. 17 U.S.C. §101 (1980).

incentive. Of course, a given author of this kind will have altogether different expectations about his or her journal contributions and about his or her textbooks and treatises. From the latter, he or she expects income, indeed, that is usually the major reason such works are created. And the revenues from textbooks vastly exceed that from trade titles.<sup>151/</sup>

In cases where authors are indifferent to income, nothing prevents them from disclaiming copyright or dedicating their works to the public domain. Some do. In addition, permissions to copy can be generously given.<sup>152/</sup>

Other authors expect or depend either partially or wholly upon income from their writings.

That having been said, all authors of books or articles depend upon a publishing infra-structure. Copyright sustains this infra-structure; for, it engrosses not only the author's right, which he or she may forego, but also the publisher's, and allows the publisher thereby to recover the costs of doing business. In some cases, it also allows profit; in other cases, where profit is not a goal, it enables survival.

Consequently, to observe that authors and publishers are of different kinds is useful, but does not resolve the question of what the scope of copyright protection should be, nor what exemptions, including those for photocopying, should be provided. It does afford an explanation of why, on these issues, publishers sometimes speak as proxies for authors and libraries for their patrons.

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<sup>151</sup>. In 1979, text sales comprised 72% of the text-trade mixture. Congressional Research Service, Economic Concerns Relating to the Elimination of the Manufacturing Clause of the U.S. Copyright Law. (1981), Table 10 at 60.

<sup>152</sup>. See text infra IV D(1)(a).

# 1. Publishers.

The King Report classified library photocopying by type into book, serial, and other.<sup>153/</sup> The publisher survey addressed both book and serial publishers. This survey revealed that the revenues of serial publishers increased between 1976 and 1980: 41% for all serial publishers and 50% for the publishers of SST journals.<sup>154/</sup> During the same period the ratio of serial "births" to "deaths" was 3.4 to 1.<sup>155/</sup> Of the journals reporting changes in circulation, 73% of the SST journals and 83% of other serials reported increases.

Librarians emphasize that they have not decreased their serial subscriptions.<sup>156/</sup> The KR bears this out. On the other hand, over 6.5 million photocopies of serial material are sent from library to library each year; few of them (1.1%) are paid for or authorized.<sup>157/</sup>

Most of the proprietors testifying at the regional hearings were publishers of SST journals. There is evidence that these journals are being photocopied extensively. On fact, one publisher reminded the audience at the Washington Hearing that books were also being copied.<sup>158/</sup>

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153. KRT 3.10.

154. KRT 4.9.

155. KRT 4.5.

156. Anaheim Hearings at 61, 86 (statement of Norman Dudley).

157. KRT 3.11.

158. 2 Washington Hearing at 136 (statement of Charles Butts).



Most SST journals have limited circulations.<sup>159/</sup> Their primary source of income is library subscriptions.<sup>160/</sup> They perceive themselves to be especially vulnerable to photocopying. Although the KR indicates growth for SST and other journals, there was, some evidence that SST publishers had suffered decreases in subscriptions they believed traceable to photocopying. One publisher reported that his sales had dropped from 1,500 copies in 1970 to 250 in 1979-80, and traced this drop to the growth of reprography, noting that he now sells a subscription to only one institution within a certain area.<sup>161/</sup> Another publisher reported that revenues were less than anticipated because a number of subscribers purchased individual subscriptions and made further copies to distribute to committee members instead of placing an institutional subscription and receiving twenty copies.<sup>162/</sup> Dr. Koch of the American Institute of Physics reported an overall decline in subscriptions had gone from 2 to 3% in the last few years; he also noted that library subscriptions had remained reasonably constant while individual membership subscriptions had dramatically decreased.<sup>163/</sup>

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<sup>159.</sup> Almost 75% of all SST journals have circulations under 10,000. KRT 4.6.

<sup>160.</sup> See KR at 4-1.

<sup>161.</sup> Anaheim Hearings 100-3 (statement of Sol Grossman).

<sup>162.</sup> App. V, Part 2, at 20-21.

<sup>163.</sup> Anaheim Hearing at 32-33.

At the same time that publishers testified that it was difficult to prove that library photocopying was causing economic harm,<sup>164/</sup> they also asserted that such proof was not necessary. The chairman of AAP even charged that a resolution by a library association calling for proof of economic harm was "a subterfuge."<sup>165/</sup>

Because the factors affecting sales volume are multiple, it is difficult to prove that photocopying has caused economic "harm." And indeed no one has yet offered a test, definition, or measure of what constitutes economic harm. Serial publishers' revenues are rising; new serial titles are appearing. Beyond that, nothing more can be said, absent a definition of "economic harm." More revenues to publishers and more serial titles are no more illuminating than more pages photocopied in libraries.

## 2. Authors.

a. Royalty "issue." Librarians questioned the right of publishers to press complaints about non-payment for photocopies, observing that few authors whose works are photocopied receive royalties and many are not paid for the work initially.<sup>166/</sup>

It is also true that authors did not come forward saying, "We want our royalties." Instead, publishers claimed royalties. The testimony is mixed, but it does reveal that some publishers share royalties depending on the nature of the publishing, the type of work, and the cost. Most

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<sup>164.</sup> This may explain part of their reluctance in responding to the King survey of publishers. See the statement of Allan Wittman, rejecting the proposition that publishers are obligated to show harm as a condition of copyright. New York Hearing at 103.

<sup>165.</sup> 1 Washington Hearing at 84-85 (statement of Townsend Hoopes).

<sup>166.</sup> App. III, Part 2 at 60.

publishers at the New York and Washington hearings testified that they shared royalties ranging from a minimal amount to as high as 50%.<sup>167/</sup> The University of Texas Press divides royalties 50-50.<sup>168/</sup> One literary magazine -- the New Yorker -- reported paying 100% of all fees received for copying, reprinting, or reproduction of the material to the author.<sup>169/</sup>

Usually, however, scientific publishers pay no royalties. Dr. Koch of the American Institute of Physics (AIP) testified that AIP authors did not share any income from royalties or subsidiary rights.<sup>170/</sup> The American Chemical Society (ACS) only pays authors royalties for books and not for the articles published in its primary journals. Authors must sometimes pay page charges in order to have their works published in some journals.<sup>171/</sup>

Another publisher of scientific materials reported that although he paid a 30% royalty to the society whose members' works he published, he was not sure whether any of this was distributed to the individual author.<sup>172/</sup> In a 1977 CONTU hearing one distributor of republished materials testified that many publishers did not want to be paid for use of their materials because it was not worth the recordkeeping.<sup>173/</sup>

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<sup>167.</sup> 1 Washington Hearing at 59, 133; 2 Washington Hearing at 84, at 141, at 199-200.

<sup>168.</sup> Houston Hearing at 40 (statement of Dr. John Kyle).

<sup>169.</sup> 2 Washington Hearing at 104 (statement of Janet Muir).

<sup>170.</sup> Anaheim Hearing at 11, 38.

<sup>171.</sup> Houston Hearing at 97, 103 (statement of Dr. Michael Bowen).

<sup>172.</sup> Anaheim Hearing at 105-9 (statement of Sol Grossman).

<sup>173.</sup> Transcript CONTU Meeting No. 17 at 81 (Statement of Dr. Eugene Garfield).

Publishers declared that royalty payments were necessary in order for the publisher to survive.<sup>174/</sup> A representative of the ACS expressed concern that "photocopying practices, if they do not return revenues to publishers, can lead to steep subscription price increases ... threaten the publishing enterprise. Without financially healthy journals there would be nothing to photocopy."<sup>175/</sup>

b. Duality of Author's Position on Royalties. To get a broad range of views on library photocopying, the Copyright Office placed announcements of the regional hearings in several periodicals.<sup>176/</sup> Despite these announcements, very few authors appeared or even sent comments. Those who did were usually educators.<sup>177/</sup>

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174. See Houston Hearing at 90, (statement of Michael Bowen); at 34-35 (statement of John Kyle); App. V, Part 2, at 20-21.

175. Houston Hearing at 90 (statement of Michael Bowen).

176. They included: Author's League Newsletter, Publishers Weekly, Chronicles of Higher Education, and American Libraries.

177. This lack of response on the part of authors may be due to several factors:

- (1) Authors may feel that their views are being adequately expressed by publishers or organizations such as the Author's League.
- (2) The authors with the highest general (non-photocopying) royalty expectations -- the authors of trade best sellers -- perceive only a small photocopying threat.
- (3) The authors of the works which are most heavily photocopied are not objecting to photocopying since their primary purpose is dissemination of ideas.
- (4) Most of the authors of the works photocopied extensively do not generally receive royalties.

Authors nevertheless were resourcefully, perceptively, and articulately represented throughout these debates by the Authors League. However, since SST journals are the works about which there is great photocopying-copyright sensitivity, one might note that the authors of their articles are unlikely to belong to the Authors League.

Organizations like the AIP and ACS presented evidence that the primary purpose of their journals is to disseminate articles widely. ACS states dissemination to be the primary purpose and that their authors want to show themselves and their institutions at the forefront of research,<sup>178/</sup> but they also viewed copyright protection as facilitating that primary purpose.<sup>179/</sup>

Because payments for photocopying are meager, the question of how much of those small amounts reach the author does not materially affect the present examination of "balance."

#### D. Modes Of Compliance.

##### 1. For copies made in libraries.

a. Permission in advance. Where copying is believed not to be authorized by §108, a user or librarian can ask the copyright proprietor for permission to copy. Testimony as to the efficacy of this method was mixed. Since including the proper information on the request is essential to timely treatment by the copyright proprietor, the Copyright Office believes that a standardized form to elicit all essential information should be used. Members of the library community have been amenable to

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<sup>178</sup>. Houston Hearing at 89, 106 (statement of Dr. Michael Bowen).  
See also Anaheim Hearing at 6 (statement of Dr. William Koch).

<sup>179</sup>. See, e.g., Houston Hearing at 102 (Dr. Michael Bowen); Anaheim Hearing at 8-20 (statement of Dr. William Koch).

publishers drafting a standard form;<sup>180/</sup> Publishers, however, are concerned that antitrust problems might be encountered in mutually settling on a standard form for all such requests. Consequently, no standard form has been adopted. The AAP has nevertheless published and distributed guidelines<sup>181/</sup> to help the requestor present all essential information.

Publishers suggest that this form should include the following:

1. Title, author and/or editor, and edition of materials to be duplicated.
2. Exact material to be used, giving amount, page numbers, chapters and, if possible, a photocopy of the material.
3. Number of copies to be made.
4. Use to be made of duplicated materials.
5. Form of distribution (classroom, newsletter, etc.).
6. Whether or not the material is to be sold.
7. Type of reprint (ditto, photocopy, offset, typeset)<sup>182/</sup>

Librarians have circulated these suggestions.<sup>183/</sup>

Today most major publishers have a department or person to handle permission requests.<sup>184/</sup> Some librarians complained about the length of response time<sup>185/</sup> or that response was never received.<sup>186/</sup> However, publishers

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180. See note 63 infra

181. According to Carol Risher, AAP based their form on what member publishers said was necessary. By January, 1981, 26,000 copies of this form had been sent out, 16,000 of them to all of the school districts in the United States.

182. App. II, Part 2, at 111.

183. ALA Model Policy Concerning College and University Photocopying for Classroom, Research and Library Reserve Use. 7 (March 1982).

184. See generally discussion by the Permission Panel, New York Hearing 221-275.

185. Houston Hearing at 17 (statement of Barbara Prewitt), at 68 (statement of Neill Megaw).

apparently usually deal with these requests in a timely fashion.<sup>187/</sup> Response to a request may be delayed by circumstances outside the publisher's control, e.g., inadequate information in the request, need to acquire permission from an author, or time needed to find out whether the requested material is really the original copyrighted material of the publisher receiving the request.<sup>188/</sup> Publishers insist that delay is usually to the requestor's advantage. A quick "no" answer is always possible; but time consumed in clearing with the author or obtaining a sufficient answer may result in "yes." In any event, they caution, silence does not mean consent.<sup>189/</sup>

Since the passage of the 1976 Copyright Act, permission requests from libraries have increased.<sup>190/</sup>

(i) With payment. It is not clear how many publishers condition permission to copy upon payment of a royalty or fee. One publisher, whose firm has its own unwritten policy, testified that sometimes his firm charged and sometimes it did not. The implication was, however, that charges were made to commercial users.<sup>191/</sup> Another testified that no charge

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186. New York Hearing at 127-130 (statement of Weil).

187. New York Hearing at 242 (statement of Camille Truschel, McGraw-Hill Book Co). Out of 120 requests/week; 6,000/year, the normal turnaround time is two weeks. Id. at 241. Gerald Summer, Manager of Permissions Dept. at Random House also estimated a two-week turnaround. Id. at 245. Most librarians agree that the turnaround time for most requests is within a comparable time period. See, e.g., Houston Hearing at 17 (statement of Prewitt), See also KRT 2.21 and 4.12.

188. New York Hearing at 234-237 (statement of Helen Padgett, Marketing Coordinator of Williams & Wilkins).

189. New York Hearing at 235-237.

190. Id. at 242 (statement of Camille Truschell).

191. New York Hearing at 111 (statement of Allan Wittman).

was made for a "minor use," but a moderate fee was required for "substantial uses."<sup>192/</sup> The American Business Press takes into account the nature of the request, the number of copies involved, and the economic costs.<sup>193/</sup>

(ii) Without payment. As indicated, publishers may charge for substantial or commercial copying. Some librarians have reported that publishers have charged them for permission to copy,<sup>194/</sup> but frequently permission to use the material is granted freely.<sup>195/</sup> Publishers also reported giving permission in many cases without charge.<sup>196/</sup>

b. Broader licensing. Collective systems and individual blanket licenses offer alternatives to individual requests to publisher and/or author.

(i) Copyright Clearance Center (CCC). In 1975 the Senate, in discussing "systematic" copying, urged that "workable clearance and licensing procedures be developed,"<sup>197/</sup> Since 1978, the Copyright Clearance Center, initiated by the AAP and the Authors League at least partly in response to that suggestion, has provided a central source for permissions to copy. The CCC was designed to accommodate librarians who had complained that obtaining permissions required dollars in order to collect

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<sup>192</sup>. Id. at 245 (statement of Gerald Summer).

<sup>193</sup>. App. VII at 215-216. See also 1 Washington Hearing at 95 (statement of Leo Albert),

<sup>194</sup>. See Chicago Hearing at 156. See also App. VII at 7.

<sup>195</sup>. 1 Washington Hearing at 15 (statement of Elsie Cerrutti); at 44 (statement of Patricia Berger. See also Anaheim Hearing at 105-6 (statement of Sol Grossman) at 77 (statement of James Cox).

<sup>196</sup>. See 1 Washington Hearing at 95 (statement of Leo Albert); at 58-59 (statement of Sanford Thatcher); 2 Washington Hearing at 106 (statement of Janet Muir).

<sup>197</sup>. Sen. Rep. No. 473 at 71.



dimes.<sup>198/</sup> The clearance system operated by the CCC permits a registered library to copy any article from a title registered with the CCC and already within the possession of the library. There is no delay: the library makes copies as needed and ultimately remits to the CCC. As of October 1982, the CCC had 5,367 titles registered, 604 participating publishers, and 1,399 users.<sup>199/</sup>

Librarians have given a variety of reasons for not joining the CCC:

1. It does not provide the document wanted.
2. It does not cover an extensive number of titles, and those it does cover are primarily scientific or technical.
3. The record keeping is cumbersome, and they would prefer to go directly to the publisher.
4. It costs money, and the publisher, notwithstanding its CCC participation, might grant permission gratis.
5. The photocopying that they do does not require the payment of fees.
6. The fee does not go to the copyright proprietor.<sup>200/</sup>

The first and last points reflect some misconception about what the CCC is designed to do. It does, indeed, not provide copies; it provides a mechanism for obtaining permissions automatically for copying authorized by neither §107 nor §108, often without regard to where such copying occurs. Copying not authorized by those sections is subject to the control of copyright owners; if they assign their rights to anyone, that assignment must be honored by everyone.

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<sup>198.</sup> Chicago Hearing at 11.

<sup>199.</sup> Letter from David P. Waite, President of Copyright Clearance Center, to Dorothy Schrader, Copyright General Counsel, Dec. 10, 1982, p. 4-5.

<sup>200.</sup> See generally Chicago Hearing at 33, 40, 74, 95-96, 130-131, 154, 173, 178, 197.

Publishers have also been slow to join the CCC. The CCC is attempting to solve all of these problems by educating users and publishers.<sup>201/</sup> David Waite, President of the CCC, observed that the CCC had experienced only moderate growth under the current Transactional Reporting System, but expected more rapid growth under a new system, the Annualized Authorizations Service.<sup>202/</sup>

The Annual Authorizations Service is especially designed to meet the requirements of large organizations who need to internally copy and distribute a significant number of copyrighted material and desire to obtain permission to copy quickly and efficiently.

1. An agreement with publishers which empowers the CCC to act as their agents in authorizing users, to make and distribute copies and collecting fees for this copying and
2. An agreement with users, which sets forth the terms and conditions for the annual CCC authorizations.

The user organization then may make one annual payment to the CCC, to cover all copyrighted publications of participating publishers. The user only records and reports photocopying activity to the CCC for a sampling period.

The new service will not replace but operate in addition to and in conjunction with the transactional service presently operated by the CCC.<sup>203/</sup> The recently settled dispute between several publishers and Squibb<sup>204/</sup> calls for a modified procedure for reporting and payment of fees for copying to the CCC.

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201. Id. at 74-78, 87, 95-96 (statement of Charles Lieb).

202. Letter, David Waite to Dorothy Schrader, December 10, 1982.

203. Id.

204. See, text infra, II.

(ii) Blanket licenses. The concept of a voluntary single payment blanket license has advantages. King asked publishers how many "blanket agreements" or "blanket licenses" they had whereby organizations could copy any item whose copyright that publisher controlled without making an individual request every time. The survey only revealed an average of 1.1 such agreements per publisher.<sup>205/</sup>

The CCC is now establishing a blanket license for large organizations with the Annualized Authorization System discussed above. Such arrangements will probably find acceptance in corporate libraries rather than in academic libraries.

(iii) Amplified notice, e.g., Law Review Compact. Members of the American Association of Law Schools (AALS) have adopted a policy that permits non-profit copying of articles appearing in the law reviews of AALS member institutions, for educational purposes.<sup>206/</sup> On March 20, 1978, the AALS recommended that member schools approve copyright clearance for educational photocopying. In so doing, they also suggested two ways in which notice of this permission for copying could be given in the law journal.<sup>207/</sup> Later, AALS suggested a third way to indicate copying permission and asked how many law schools had complied.<sup>208/</sup> Of the AALS members, about 100 law schools<sup>209/</sup> now contain information in the masthead of the law journal that

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205. KRT 4.13 at 4.31.

206. App. VII at 69.

207. AALS Memo, March 20, 1978.

208. AALS Memo, May 23, 1978.

209. Conversation with James Heller, Chairman, American Association Law Library Copyright Committee.

permits copying for educational purposes.<sup>210/</sup> Permission of this kind may spread to other types of journals. Some authors are including such a notice on their work.<sup>211/</sup>

2. For copies prepared elsewhere.

a. Past experience

(i) NTIS/JACS. In 1977-1978, the Department of Commerce's National Technical Information Service (NTIS) operated the Journal Article Copy Service (JACS). Its users were willing to pay royalties, but did not want lengthy delays. JACS was a centralized automated order transfer and accounting system linked to existing document delivery services of libraries and information brokers.

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210. See, e.g., Journal of Legal Education, Cornell Law School:

Except as otherwise expressly indicated, the author of each article in this issue of the Journal has granted permission for copies to be made for classroom use in a nationally accredited law school so long as (1) copies are distributed at or below cost, (2) author and Journal are identified, and (3) proper notice of copyright is affixed.

The Yale Law Journal:

Except as otherwise provided, the author of each article in this issue has granted permission for copies of that article to be made for classroom use, provided that (1) copies are distributed at or below cost, (2) author and journal are identified, (3) proper notice of copyright is affixed to each copy, and (4) the user notifies the Yale Law Journal that he or she has made such copies.

Georgetown Law Journal:

For all articles in which it holds copyright, the Georgetown Law Journal grants permission for copies of that article to be made and used by nonprofit educational institutions, provided that the author and the Georgetown Law Journal are identified and that proper notice of copyright is affixed to each copy. Except when otherwise expressly provided, the copyright holder for every article in this issue for which the Georgetown Law Journal does not hold copyright grants permission for copies of that article to be made and used by nonprofit educational institutions, provided that the author and the Georgetown Law Journal are identified and that proper notice of copyright is affixed to each copy.

211. See, e.g., Treece, Library Photocopying, 24 UCLA L. REV. 1025 (1977).

By the end of 1978 JACS covered 5,000 journal titles from about 500 publishers and used about 17 fulfillment services (libraries, information brokers, publishers). It had about 1,000 customers and handled up to 100 orders per day. JACS accepted orders in electronic form from NTIS customers and relayed these orders to a fulfillment service for pulling, copying, and mailing to the customer the next business day. Ninety-five percent of the orders accepted were filled, and the typical order was filled four days after it was requested.<sup>212/</sup>

The program was disbanded in 1979 for political and budgetary reasons. But, as the former Deputy Director of NTIS responsible for JACS observed, "...the two-year experimental operation of the system clearly demonstrates the feasibility of an automated, decentralized article delivery system with a royalty payment mechanism as an integral part of the system design."<sup>213/</sup>

b. Present experience

(i) ISI. Today the Institute of Scientific Information (ISI) is one of more than 50 organizations that provides document delivery service for a fee. ISI's Original Article Tear Sheet Service (OATS) was designed to supply full-text copies of articles that are not readily available from more traditional channels such as libraries or reprints from authors. Originally, the service was offered only to ISI customers, and they still get a preferred rate.

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<sup>212</sup>. New York Hearing at 5-41 (statement of Peter Urbach).

<sup>213</sup>. Id. at 8.

In 1977 Dr. Eugene Garfield, President and Chairman of the Board of ISI, reported that ISI processed over 5,000 journals representing all physical and social sciences. He noted that more than 500,000 articles a year, about 100 articles per journal, were processed and indexed and that he expected to fill more than 110,000 OATS orders in 1977. He also estimated that only 12% of the requests represent more than one request for the same article and that ISI pays royalties to all publishers who want them.<sup>214</sup>/

In 1981, ISI processed over 6,000 journals, indexed over 825,000 articles and filled over 150,000 orders. ISI usually receives no more than one or two requests per article requested. The average turnaround time is 48 hours. ISI charges \$6.75 for an article of 20 pages or less, and most requested articles are within that range.<sup>215</sup>/

Of the journals indexed, approximately 30% are made available through OATS under direct contractual agreement between ISI and the specific publishers. Approximately 5% of the journals available through OATS are accessed through the agreement established between the CCC and the member publishers (copyright authorization is between the CCC and the publishers and not between ISI and the publishers in this instance). The balance of journals covered through OATS are those in the public domain, or those for which the publisher has not responded to ISI or CCC requests for royalty agreements.<sup>216</sup>/

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214. CONTU Transcript No. 17, at 71-98, Oct. 21, 1977 (statement of Dr. Eugene Garfield).

215. Telephone Conversation Karen A. Gniewoz, December 28, 1982.

216. Id.

(ii) University Microfilms International (UMI). University Microfilms International, formerly known as Xerox University Microfilms, is another major organization that provides documents for a fee. The company, located near the campus of the University of Michigan in Ann Arbor, is a part of the Xerox Publishing Division. UMI is a publisher on demand of serigraphs, documentations, or any of its other extensive holdings, UMI provides its customers with an exhaustive catalog not only listing all titles available -- over seven hundred and sixty pages in the 1982-1983 catalog -- but also explains how to order material.<sup>217</sup>/ Libraries, including the Library of Congress, are the main customers.

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<sup>217</sup>. See generally, CONTU Transcript No. 16, at 70, September 15, 1977 (statement of Stevens Rice).





## CHAPTER V. KING REPORT

A. Introduction.

The question whether section 108 has achieved the desired statutory balance can not be answered simply by examining its provisions and the opinions of the persons affected by them. To be sure, the textual provisions and the views of the parties do provide an observer with an understanding of what the law is perceived to mean; but the existence of a balance ultimately depends on how people behave when their conduct falls within the law's ambit. The Copyright Office employed two different methods to learn the nature of present practices concerning library photocopying.

First, as set out in the law, the representatives of authors, publishers, libraries, and their users were consulted. The initial steps in this consultation took the form of the appointment, by the Register, of an Advisory Committee of ten persons whose breadth of experience and expertise made them likely if not obvious choices to serve on any group whose task was to consider issues concerning library photocopying.<sup>1/</sup> After several meetings with the Advisory Committee, the two information-gathering methods were selected: (1) a series of hearings were held throughout the country at which persons affected by or interested in §108 presented their views (either at the hearings or in writing); and (2) several statistical surveys -- of publishers, libraries, and their patrons -- were carried out.

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1. A list of the members of the Advisory Committee is set out at page A-3 of the King Report.

The purpose of the surveys was to obtain, where it might be available, some objective evidence concerning the issues about which dozens of witnesses and respondents expressed their opinions and beliefs. With the help of the Advisory Committee, bids were solicited so that a contract could be let to perform the work. King Research, Inc., of Rockville, Maryland, was selected as a result of the bidding. The surveys were conducted, for the most part, during calendar 1981, and the King Report (hereinafter "KR") was submitted to the Copyright Office in May, 1982. Additional data were requested and received in July and December. This chapter of the Copyright Office report deals with the results of the surveys conducted by King. The KR itself is Appendix I of this report.

Before turning to the specific findings found in the KR, it may be useful to state briefly the contents of the remainder of this chapter. The next section describes the scope of the various surveys, the levels of cooperation by the surveyed populations, and the accuracy of the findings. It is designed to give the reader some understanding of what King set out to accomplish and the extent to which those goals were achieved.

Following the survey descriptions is the section which sets out the facts as found by King and their relationship to the issues discussed throughout this report. In that section, the views expressed by interested parties concerning the validity, relevance, and meaning of the King data are, of course, considered. As can be seen from the record, and in this report, the parties to the various disputes arising under the provisions of §108 do not universally accept all of King's "facts" as authoritative. This is, of course, particularly true when the evidence adduced in the KR runs contrary to the beliefs or positions of the parties. The questionnaires and methods employed by King are part of the record upon which this report

is based. The Copyright Office is confident that the surveys were performed in the manner most likely to yield useful results and that any shortcomings in the data result from a variety of factors: the disappointing lack of cooperation on the part of two classes of surveyees; the difficulties inherent in reaching agreement among diverse interests; whether and how certain issues should be raised and questions asked; and, the ever-present constraints of time and money. As good and useful as King's work is, it could perhaps be done better if all concerned, with the benefits of their recent experience, were to engage in their work now rather than in 1981. Accepting, however, that foresight is never 20/20, the Copyright Office is satisfied that the KR contains a wealth of information which is very useful in determining whether the desired balance between creators and users exists.

#### B. The Surveys.

The implicit purpose of all of the surveys conducted by King was to attempt to quantify the behavior of people whose activities in some way concern or are affected by library photocopying. The obvious reason for this was to learn how people's behavior and experiences comport with the statements and beliefs of their representatives. This is not necessarily a criticism of the representatives; indeed, on many occasions, the common wisdom or traditional position was borne out by the evidence. At times, however, the information contained in the KR seemed at odds with the expectations of some or all of the persons who were involved with the creation of the record or the preparation of this report. On some occasions, moreover, the existence of a balance, and the desirability or necessity of a change in the law, appeared to rest, at least in part, on the credibility

of the data or their interpretation. In these respects, the Congress may wish to examine very carefully the positions that the parties will likely express to it.

1. Authors.

As was the case in the hearings,<sup>2/</sup> no method for obtaining information directly from the authors of works which are often photocopied, or who had other relevant photocopy-related experience, seemed available to the Advisory Committee, the Copyright Office, or King Research. Thus, there was no survey of authors, as such. It is, however, largely true that publishers, particularly those of the kinds of works whose photocopying is especially popular and believed to be of serious consequence, may serve as valid proxies for their authors with respect to the issue of photocopying.

Although this seems clear to the Copyright Office, some library organizations apparently disagree, on the grounds that publishers are not among the "creators" to whom section 108(i) directs the focus of this report; and, that many authors of scholarly articles are interested only in the widest possible dissemination of their works, without regard to such traditional copyright considerations as royalty revenues and control over public distribution. Whatever the merits of these contentions, they are not particularly relevant to the question whether, with respect to photocopying issues, the interests of authors and publishers are common enough that the latter may serve as valid proxies for the former.

Whatever the positions taken by the persons who initially write text for publication, the Copyright Office is aware of no circumstances in which a publisher undertakes to print and distribute such works without

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2. See text supra, IV C(2).

first obtaining substantial copyright rights in the work, either by conveyance, license, or the "work-made-for-hire" provisions of the law.<sup>3/</sup> Thus, the authors' interests may be reasonably seen to be consolidated in the publishers of the works whose photocopying gave rise both to section 108 and the need for this report.

## 2. Users.

At the other end of the photocopying spectrum from authors are library patrons or, as they are known here, users. Unlike authors, they proved readily identifiable and surveyable. Two different groups of patrons were the subjects of slightly different surveys.<sup>4/</sup> The first survey was directed essentially to all persons entering certain libraries. They were asked questions about photocopies of library materials which they had made or obtained in the previous six months. The second survey was of those patrons who were actively using photocopying machines in the same libraries. They were asked questions about the photocopying they were then doing.

The goal of the Copyright Office was to obtain the results of 1250 interviews of patrons from 25 libraries. Ideally, the libraries were to be evenly divided among the five types of libraries to which the "library" portions of the KR were directed: academic, public, federal, and special libraries, with the last class divided as between those special libraries located in for-profit entities (SFP libraries) and those in not-for-profit organizations (SNP libraries). King contacted 65 libraries

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<sup>3</sup>. 17 U.S.C. §§ 101 (definition of "work-made-for-hire") and 201(b) (1980).

<sup>4</sup>. The user questionnaires are found at Appendix D of the KR.

but could find only 19 which both had user-operated photocopy machines and were willing to permit King employees to conduct surveys of their patrons. These included five public and SNP libraries, four academic and federal libraries, but only one SFP library. In order to get more data from patrons of SFP libraries, King then added to its list two such libraries which were willing to let their patrons be interviewed but which did not have "floor machines." The Copyright Office was disappointed that here, as in the hearing process, SFP libraries declined to participate at the same level as all other types of libraries. Since the parties are sharply divided about the applicability of some or all of §108 to such libraries, the debate which will likely follow this report could have been substantially better informed had more SFP libraries chosen to share their information with the public.

Notwithstanding the reservations of some librarians, the goal of 1250 interviews was exceeded: all told there were 1980 questionnaires completed, with the "per-type" goal of 250 being substantially met or exceeded in all library types save SFP. Even there, with only three libraries ultimately participating, 63% of the desired interviews were conducted. As far as the Copyright Office can determine, these surveys mark the first successful effort to quantify the photocopying behavior of library patrons on a broad basis in several types of libraries. Most previous surveys dealt either exclusively with libraries or with so few users as to be far less significant.

Although the interviewers in these surveys asked their questions of different pools of users, the questions asked of the two groups were substantially the same and, significantly, so were the answers given by the users. Given the size of the pools — 1157 "entrants" and 823 "copiers" --

and the strong similarity of their answers, it is reasonable to conclude that the data derived from these users represent, at a minimum, a fair approximation of the behavior of user populations in the surveyed libraries. At the same time, since only 21 libraries were the sites of the user surveys, it is not clear how confident one can be in attempting to extrapolate from these data across the national population of library patrons.

### 3. Libraries.

#### a. Phase One.

The various library surveys were the focus of much of the attention paid to the KR by the parties. This is understandable since the "library" portions, chapters two and three, comprise the bulk of the report. Phase One of the surveys consisted of sending questionnaires<sup>5/</sup> to enough randomly-sampled libraries to obtain a total of 500 answers from the five types of "target" libraries: public, academic, federal, SFP, and SNP. For a variety of reasons,<sup>6/</sup> data were not sought from "school libraries" i.e., those located in elementary and secondary schools.

Overall, some 70% of the libraries receiving questionnaires (554 of 790) filled them out and returned them. This cooperation ratio was met or bettered in all types of libraries except "specials" where, it appears, the reluctance of SFP libraries brought the overall cooperation rate for "specials" down to 58%.<sup>7/</sup> King's goal was to obtain 100 responses from

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5. The Phase One Questionnaire is set out in Appendix A to the KR.

6. The Advisory Committee and the Copyright Office concluded that, given budget constraints, there was less to be learned from school libraries than from the "target" types.

7. King Report Table (KRT) 2.1.

each type of special library. Because an a priori division between SFP and SNP libraries was frequently impossible, such libraries often classified themselves in their responses.

Ultimately, some 37.4% of the "special" respondents proved to be SFP libraries. While this could reflect either the actual ratio of SFP's to all special libraries, or the reluctance of SFP's to cooperate with the survey, or both, the Copyright Office is inclined to credit, to a degree, the second hypothesis, given SFP libraries' clear reluctance to participate fully in the hearings and the user survey.<sup>8/</sup>

Overall, questionnaires were received from enough libraries to justify some confidence that the data contained in chapter two of the KR, based on Phase One of the surveys, fairly reflect library photocopying behavior in general.

b. Phase Two.

The last question asked of libraries in the Phase One questionnaire was whether they were willing to make additional efforts to provide further data for the survey. Volunteering libraries were asked to keep detailed logs of staff photocopying and interlibrary "loan" (ILL) transactions. Of the 554 libraries which took part in Phase One, 149 volunteered to keep ILL logs and 150 agreed to keep photocopying transaction logs. This excellent level of cooperation led ultimately to the receipt by King of detailed records of 7,651 ILL requests and 15,863 staff photocopying transactions.

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<sup>8</sup>. See text in the "User" section, supra. SFP participation rates in Phase Two of the Library Survey (see infra) is perhaps less significant because only volunteers from among Phase One participants were used.



The general reliability of the data derived therefrom, and contained in chapter three of the KR, may be seen in King Report Table (KRT) 1.1 and 1.2, where one may calculate, for example, that there is a 90% probability that the number of photocopies made from serials in 1981 by public library staff members, nationwide, was between 10.8 and 12.8 million.<sup>9/</sup> (This is the number of complete copies, not the number of impressions (i.e., pages)). This level of confidence permits one to say that the data in chapter three of the KR reflect a reasonable, if concededly imperfect, view of reality.

#### 4. Publishers.

Initially, proprietary and library members of the Advisory Committee held different views as to the scope of any survey of publishers. Librarians argued that the word "balance," to which this whole report is directed, virtually required an examination of publishers' policies, practices, and revenues if the effort were to be complete and fair. Publishers, on the other hand, were not keen on being surveyed at all and were vigorously opposed to being required to disclose any confidential financial data. This opposition had two largely unrelated bases: a desire not to disclose confidential business information and the belief that economic harm is irrelevant to copyright policy for photocopying.

For a variety of reasons, the publishers survey was nonetheless carried out. Library members of the Advisory Committee made clear the

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9. This range is based upon the estimate of 11.8 million plus or minus the quantity 1.64 times the standard error (which in this case is 591,000). To increase one's confidence from 90% to 95%, one multiplies the standard error by 1.96, here yielding a range of 10.6 to 13.0 million copies.

strength of their feelings that a publisher survey was completely necessary, both for the information it would yield and to persuade libraries that their participation was part of an even-handed survey, whose burdens were spread across all sectors of the photocopying-interested community. In addition, great pains were taken to ensure the confidentiality of the data gathered in all the surveys. Neither competitors, adversaries, the Copyright Office, the Library of Congress, Advisory Committee members, nor the public will ever have access to completed questionnaires nor to any other item by which an individual respondent's data can be attributed to him. The data appear in the KR only in the aggregate and all forms from which a respondent could be identified were destroyed after having been tabulated. Finally, although it is important to remember that economic harm is not an element of an action for copyright infringement, the effects of photocopying behavior -- including the transfer (or nontransfer) of monies related to photocopying -- are central to certain contentions about what constitutes a balance.

The Copyright Office wanted to obtain data from at least 450 publishers, divided into three classes: publishers of books, publishers of scholarly, scientific, or technical (SST) journals, and publishers of all other serials.<sup>10/</sup> To that end, King took the extraordinary step of calling a randomly-selected sample of 969 publishers to ask them to fill out the questionnaire.<sup>11/</sup> From the 556 publishers who initially agreed to cooperate, a list of 450, evenly divided among the three types, was chosen and questionnaires were sent to them.

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10. Definitions of each of these types of publisher may be found at pages 4-3 & 4-4 of the KR.

11. The publisher questionnaire appears as Appendix C of the KR.

Notwithstanding the preliminary telephone calls, their prior agreement, a letter of explanation from the Copyright Office which accompanied the questionnaires, and various follow-up techniques employed by King, only 51% (231 of 450) of the publishers returned usable questionnaires. Although this level of response was disappointing, the reasons sometimes given -- both for not initially agreeing and for not completing the questionnaire after having agreed to do so -- include the interesting comments (on several occasions) that the publisher was not concerned with copyright, photocopying, or both.

The publisher data may not therefore be as random as one would like, as they may disproportionately come from those publishers most concerned with photocopying. Nonetheless, they are interesting; and, as KRT 1.3 permits one to calculate, they are satisfactorily precise. For example, one may be 90% confident that the mean revenue of SST journal publishers in 1980 was between \$576,700 and \$627,300.<sup>12/</sup>

### C. King's Findings and Their Meaning.

#### 1. KR Chapter One. Introduction and Summary.

Apart from the brief descriptions of the surveys and the "statistical precision" tables, which appear on pages 1-1 through 1-4 and 1-14 through 1-16 of the KR, respectively, chapter one has not been used by the Copyright Office in the preparation of this report. We recommend against placing much weight upon King's section 1.2.2 ("Summary of Findings") because it represents the selection and presentation of data believed significant by the contractor rather than by the Copyright Office. Our

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12. This is calculated by taking the estimate of the mean (\$602,000) and alternately adding and subtracting 1.64 times the standard error (\$15,400).

preference would have been for King to describe the survey work done, estimate its statistical (but not legal) significance, and then turn directly to its excellent presentation of data in chapters two through five. Perhaps our preference has been strengthened by experience: public misimpressions were created when the American Library Association decided to distribute King's "Summary of Findings" to its members and other requestors, all of whom were understandably eager to see what the King survey had found. ALA acted in good faith, but the "Summary" should not be used to represent the conclusions of the Copyright Office.

This may seem petty, but it should be clear that the choice of data to include in a brief summary and how they are characterized, goes a long way toward predisposing casual readers to a conclusion about the question of balance. That question was directed by the Congress to the Copyright Office and was, most emphatically, delegated neither to King nor to the Advisory Committee. While we do not believe that King meant to exceed the scope we intended, its selection of certain data for inclusion in its summary, necessarily gives emphasis to those data, and may color the perception of the hurried reader. We therefore commend -- to Congress and all other interested readers -- chapters two through five of the KR and urge all readers to make their own copyright evaluations. We state ours throughout this report.

2. KR Chapters Two, Three, and Five. Surveys of Libraries and Their Patrons.

a. Library Practices in General.

As may be seen in King Report Table (KRT) 2.3, nearly two-thirds of all libraries (but barely more than one-third of SFP libraries) belong to ILL networks where, according to the questionnaire,

one of the features of membership is the provision of special interlibrary borrowing procedures, e.g., reduced rates for interlibrary loan, automated transmission of requests, delivery service, etc.<sup>13/</sup>

As discussed previously in this report,<sup>14/</sup> ILL photocopying is "systematic," and only permitted to the extent set out in the proviso to subsection (g)(2).

KRT 2.3 also shows that a significant (but much smaller) proportion of libraries are involved in coordinated collection development.<sup>15/</sup> According to the questionnaire, this term covers

[the] identification of libraries with subject specialties, coordinated serial retention policies, elimination of subscription overlap, etc.<sup>16/</sup>

This group of practices appears dangerously close to those described by the Senate as being prohibited by subsection (g):

... (3) Several branches of a library agree that one branch will subscribe to particular journals in lieu of each branch purchasing its own subscriptions, and the subscribing branch will reproduce copies of articles from the publication for users of the other branches.<sup>17/</sup>

The Copyright Office does not believe that the proviso, whose thrust is toward conventional ILL transactions, should be interpreted to permit, without the permission of copyright owners, the activities to which the Senate objected and which may be occurring to some extent in the 21.7% of libraries which engage in coordinated collection development.

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13. KR at A-8.

14. See, text supra, IV A(4)(a) and (c).

15. Generally between 20 and 30% but only 10.7% of SFP libraries.

16. KR at A-9.

17. Sen. Rep. 473 at 70.

The final columns in KRT 2.3 reflect the extent to which libraries are involved with photocopying. In 70.3% of all libraries there is at least one photocopy machine. Furthermore, as is shown in KRT 2.13, of those libraries least likely to have machines on the premises (SNP (40.8%) and SFP (50.2%)), fully 82.6% of them (73.4% of the SNP and 94.1% of the SFP) have machines "within walking distance."<sup>18/</sup>

Personnel as well as machines contribute to photocopying activities. In roughly two-thirds of all libraries, staff members make or obtain photocopies for patrons at least once a week.<sup>19/</sup> Indeed, as KRT 2.12 shows, more than half of all libraries (and 67.1% of all non-public libraries) operate a "photocopy service," which is defined in the questionnaire as meaning that:

at least once per week, photocopies of library materials are made by or for your library's staff in response to library users' requests.<sup>20/</sup>

Photocopying behavior is not necessarily uniform among all types of libraries. As seen in KRT 2.4, academic libraries, which comprise 15.3% of all libraries, make up 31.1% of "level one" libraries — those which have staff members permanently assigned to make photocopies for patrons. In total, 17.5% of all libraries are "level ones," but 35% of "academics" and 24.3% of SFP's have that status. While the law does not explicitly

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18. "Walking distance" means "down the hall, on another floor, within a building close by." KR at A-11.

19. KRT 2.3.

20. KR at A-11.

address such employment patterns, it is arguable that the permanent assignment of staff members to make photocopies for patrons makes the photocopying done by those employees look rather systematic.<sup>21/</sup> At all events, the data make it clear that some libraries do enough photocopying for their patrons that they have incorporated it into the regular tasks they assign their employees.

As one might reasonably expect, level one libraries are more likely than others to engage in systems and practices related to large-scale photocopying. KRT 2.5 shows that 80.2% of level one libraries belong to ILL networks (as against 64.3% of all libraries); that 35.7% belong to collection development consortia (as against 21.7% of all libraries); and that 15.7% belong to the Copyright Clearance Center, Inc., as compared with less than four percent of non-level one libraries.

b. Library Expenditures.

Among the concerns expressed by publishers with respect to photocopying is the fear that libraries, through coordinated collection development and ILL activities, are meeting budget constraints at the expense (and in violation of the rights) of publishers, particularly of serials.

Perhaps this is occurring; but its effect on library expenditures would have to be in reduced real growth rather than reductions in total purchase and subscription expenditures. After allowing for inflation, there was, between 1976 and 1980, a seven percent increase in book expenditures and a

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21. See e.g., Encyclopaedia Britannica v. Crooks, 542 F.Supp. 1156 (W.D.N.Y. 1982), where the court noted that an institutionalized off-air taping system (for educational use) with nine employees was conducting "massive videotape copying" and, thereby, committing copyright infringement. At 1169.

twelve percent increase in serial expenditures among all libraries.<sup>22/</sup> The only reduction in real expenditures occurred among public libraries with respect to serials, and that was one percent.

It thus appears that in a time of severe budgetary difficulties most libraries managed to increase their acquisitions expenditures at a rate greater than inflation. The corners that may have been cut elsewhere do not show up in the data, but phenomena such as dramatically reduced public library hours are so well documented<sup>23/</sup> it is clear, as librarians state,<sup>24/</sup> that acquisitions budgets are spared as long as money can prudently be saved elsewhere.

c. Photocopy Machine Populations.

Between 1976 and 1980 the overall number of photocopy machines per library was also growing, from 4.5 to 6.0, an increase of 33%.<sup>25/</sup> The percentage of such machines which are coin-operated (and therefore probably used almost exclusively by patrons) has remained virtually steady at 70% over the same time. This casts doubt on the assertion that librarians, "unwilling" to assume the burdens of copyright responsibility, have consciously increased the proportion of coin-operated machines in their libraries

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22. KRT 2.7.

23. See Cayton, Daring to Be Different: The Denver Public Library, 56 Wilson Library Bull. 504 (1982); Bourne, Surviving the Present: San Francisco Public Library, 55 Wilson Library Bull. 736 (1981).

24. See, e.g., Anaheim Hearing at 61, 86 (statement of Norman Dudley); New York Hearing at 78 (statement of Robert Wedgeworth), 87 (statement of Nancy Marshall), and 309 (statement of Laura Gasaway). But see, 1 Washington Hearing at 140 (statement of Maureen Seaman).

25. KRT 2.9. Expansion was largest in academic and federal libraries (70% each), 30% in SFP libraries, and 28% and 23% in public and SNP libraries, respectively.



in order to shift the burden of copyright compliance to their patrons and insulate themselves from liability by compliance with the formalistic, but simple, requirements of §108(f)(1). If such burden-shifting has been attempted, it is not seen in the data concerning coin-operated machines.

Part of the compromise inherent in §108 is the notion that by placing a warning regarding copyright in certain places a library may lawfully copy some or all of a work for a patron<sup>26/</sup> or can immunize itself from liability for the unsupervised infringements of its photocopying patrons.<sup>27/</sup>

The data in KRT 2.10 suggest that, at least in the latter area, compliance has been excellent, with librarians reporting that a warning is present on 92.9% of their coin-operated machines (where unsupervised copying is most likely to occur). From the data in KRT 2.8 and 2.10 one may calculate, however, that fully 30.4% of non-coin-operated machines (approximately 10,000 machines) bear no warning. While this is not a problem if no unsupervised copying takes place on such machines, data from the user survey suggests that more than 15% of unsupervised patron copying takes place on machines without warnings.<sup>28/</sup> Libraries run a risk of vicarious or contributory liability for the copying in excess of fair use which their users do on machines which bear no warnings.<sup>29/</sup>

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26. Section 108(d)(2) & (e)(2).

27. Section 108(f)(1).

28. KRT 5.21 shows that there were warnings on 83.4% of the machines on which users were making copies of library materials.

29. See, text supra, IV A(5).

d. Impressions.

After discussing library practices and machine populations, the KR turns briefly to some very interesting statistics on photocopying impressions.<sup>30/</sup> The first item of interest in section 2.3.3 of the KR is the disparate distribution of responding libraries which chose not to report the number of impressions made on their machines. The non-response ratios ranged from a low of 39% (Academic) to a high of 71% among SFP libraries. This latter reluctance continued the pattern of non-disclosure by SFP libraries previously noted with respect to the hearings, the user survey, and suggested in the level of responses to Phase One of the library survey.

The impression statistics which were reported in the KR suggest that coin-operated machines are used much more heavily than other machines in public and academic libraries. In public libraries, "coin-ops" comprised 78% of all machines but were the site of 99% of the impressions made. In academic libraries, where 70% of the machines were coin-operated, 87% of the impressions were made on them.<sup>31/</sup> In other library types, there were relatively few of such machines and the "coin-op" statistics were not calculated separately.

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30. An "impression" is one page of photocopying. Most of this report, like the KR, speaks in terms of numbers of copies rather than impressions.

31. KRT 2.8 and 2.11.

Perhaps the most interesting "impressions" statistic is one not found in any table: during 1980 a total of 4.97 billion impressions were made on photocopy machines in libraries.<sup>32/</sup> The mammoth volume of library photocopying which this reveals can be put in terms more accessible to most people than "billions" by considering that a single stack of 4.97 billion pages of ordinary photocopy paper would be more than 300 miles high.<sup>33/</sup> To be sure, not all of the materials from which these impressions were made were in copyright, and a very small portion of such copying was authorized explicitly by proprietors<sup>34/</sup> but, all in all, the volume of production shows, if nothing else, why proprietors are concerned about library photocopying.

e. Restrictions on Photocopying.

Of those libraries which do enough photocopying to qualify as level one or two libraries,<sup>35/</sup> fully 70% charge their patrons for photocopying done by the patrons, for the patrons, or both.<sup>36/</sup> Indeed, if one ignores those libraries whose patrons are likely to be paid by the same sources which fund the libraries (federal and SFP libraries), the incidence of fee imposition increases to 86%. Notwithstanding the strong library

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32. This datum is obtained by multiplying the mean of 272,700 impressions per library (KRT 2.11) by the number of level one and level two libraries (18,224).

33. At 2"/ream (500 sheets), the stack would be 313 miles high.

34. KRT 3.11 shows that librarians state that they obtain permission to make photocopies (with or without payment) in 1.1% of all transactions.

35. A "level two" library is one which does not permanently assign staff to make photocopies, but either has a photocopy machine, makes photocopies of library materials at least once a week for patrons, or both.

36. KRT 2.14.

tradition of providing services on a price-free basis to users, the expense of obtaining and using photocopy machines is one which most libraries have chosen to pass, in whole or in part, to those users.

In addition to requiring users to pay for the photocopies they obtain, libraries often restrict photocopying in non-monetary ways. Limiting criteria such as length of copies, number of copies to be made, types of materials to be copied, and the copyright status of such materials are applied with various frequencies.<sup>37/</sup> This said, none of these restrictions is applied by even half of all libraries. Apart from federal libraries, the only restrictions made by more than 50% of any given library type are quantitative (by 61.5% of SNP libraries) and copyright (by 52.8% of academic libraries). Tables 2.14 and 2.15, taken together, show that the most common library restriction on the ability of a patron to make or obtain photocopies is price, and that for patrons willing to pay the price imposed by libraries, other restrictions occur, in the aggregate, less than half the time.

f. Reserve Collection Practices.

The practice of keeping photocopies on reserve in a library occurs in most academic libraries, but in only 6.6% of all other libraries.<sup>38/</sup> Of those academic libraries which maintain reserve operations, 68%

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37. KRT 2.15.

38. KRT 2.16. (The 6.6% figure for "all others" is found by removing the 2884 (of 3173) academic libraries which have reserve operations from the totals).

report that the Copyright Act of 1976 has affected their policies or procedures.<sup>39/</sup> The most common effect apparently has been to require faculty members to vouch for the non-infringing status of photocopies which are placed on reserve.

g. Interlibrary Arrangements.

Much attention has been paid — by the parties, the National Commission on New Technological Uses of Copyrighted Works (CONTU), and the Congress -- to photocopying in lieu of interlibrary loan. This report avoids the use of the commonplace "interlibrary loan" in describing such behavior since, of course, there is no lending involved when a photocopy is sold or given by one library to another. The initialism "ILL" is used here (and in the KR) to refer to all interlibrary transactions involving the transfer of copies of works, including the "old-fashioned" lending of originals and the permanent transfer of photocopies.

KRT 2.17 and 2.19 reveal the extent to which libraries of all types engage in ILL activity. The former shows that slightly over 90% of all level one and two libraries sought copies of materials from other libraries during 1980. Nearly one-fifth (18.2%) of those libraries refused on at least one occasion to transmit a request to another library

on the grounds that these requests would violate applicable copyright laws or copyright guidelines.<sup>40/</sup>

The user data reveal how infrequently these refusals actually occur. KRT 5.18 shows that of the 224 "entrant" patron reports of the results of their ILL requests, 5.3% (12 reports) were of refusals. According to King,

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<sup>39/</sup> See KR at A-14 (Question 30) for the question.

<sup>40/</sup> Library Questionnaire, KR at A-17.

no one cited copyright as the reason for refusal. Most of the [users] merely stated that the item [requested] was not available.<sup>41/</sup>

Similar information with respect to "copiers" is found in KRT 5.21. There one learns that virtually one-quarter of such patrons had made an ILL request (i.e., had asked a library to obtain materials for them from the collections of another library), including fully half of the SFP patrons. Of these patrons' requests,

6.3 percent of [them] were refused.... Only two patrons cited copyright as the reason their request was refused.<sup>42/</sup>

Although the discussions concerning ILL issues often center on small libraries as net "borrowers" and large institutions as net "lenders," the data in KRT 2.19 show that almost as many libraries receive ILL requests for copies of works in their collections as make requests to other libraries (84.7% as against 91.2%). Nearly as many "requestees" refused, on copyright grounds, to fill one or more requests (16.4%) as had refused, also for copyright reasons, to transmit a patron's request (18.2%). This is interesting inasmuch as requesting libraries bear most of the copyright compliance burden in ILL transactions.<sup>43/</sup> In general, as long as requesting libraries certify to a supplying library that their request conforms with the law (generally because it does not, by virtue of its relation to previous requests, amount to a substitution for subscription to or purchase of the work requested), the supplying library need not take further steps to investigate the circumstances behind the request. That the proportion of libraries which refused to fill ILL requests is nearly the same as the

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41. KR at 5-25.

42. KR at 5-31.

43. See, text supra, IV (A)(4).

proportion which refused to transmit requests from its patrons may reflect careful copyright compliance on the part of some potential supplying libraries or confusion about the law at either or both ends of the ILL spectrum. Requesting libraries who fail to certify compliance in their requests should have such requests refused; supplying libraries who do not fully understand the level of copyright immunity granted them may be refusing to fill requests which they might lawfully fill.

Three hypotheses may be offered to account for the low rates of "refusals" of patron requests, but none can be conclusively accepted or rejected on the basis of the information at hand. Either requesting libraries do, as they have often insisted, purchase or subscribe to frequently-demanded works (thus meaning that patrons' requests need rarely be refused on cumulative quantity grounds); or the so-called "rule of five" from the CONTU guidelines is being ignored, and libraries are requesting and receiving copies in excess of Congress' intended quantities; or, upon exceeding the five-copy rule, libraries are asking/paying for permission in such a routine way that their patrons rarely suffer the inconvenience of a refusal. The parties disagree about which hypothesis most accurately reflects reality, and the King Report, although it does suggest that some unauthorized ILL photocopying is occurring,<sup>44</sup>/ does not settle this factual dispute.

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44. Data from KRT 3.10, 3.11, and 3.12 show that in 5.3 million ILL photocopy transactions, a total of 17.0 million copies were made, which calls into question the extent to which the rule of one copy at a time is being followed.

Somewhere between 20% and 30% of all ILL requests (including those which are not filled) appear to be filled with photocopies. Supplying libraries report filling 20.9% of all requests with photocopies,<sup>45/</sup> while requesting libraries report that 28.0% of their requests (and 40.0% of their filled requests) resulted in the receipt of a photocopy.<sup>46/</sup>

The mix of ILL receipts, as between originals and photocopies, was markedly different with respect to public and all other libraries. 86.5% of public libraries' ILL receipts were originals,<sup>47/</sup> whereas 67.6% of all other libraries' ILL receipts were photocopies.<sup>48/</sup>

Patron experiences are less easy to comprehend directly from the text and tables in the KR. In the interest of clarity, the Copyright Office has reformatted KRT 5.18 and 5.23 as follows:

Table 5.18(a)  
"Entrants" ILL Request Results

(Frequency with which patrons stated certain results from their ILL requests for the preceding six months)

Result	Number of Responses	One Time	More than One Time	Total
Filled--Original		61	63	124
Filled--Photocopy		32	56	88
Refused		9	3	12

45. KRT 2.20. (12,737,000 photocopies for 60,890,000 requests).

46. KRT 3.3(a) & (b). (6,961,000 photocopies out of 17,302,000 ILL receipts).

47. Ibid. 7,559,000 originals out of 8,735,000 receipts.

48. Ibid. 5,785,000 photocopies out of 8,553,000 receipts.



Table 5.23(a)  
"Copiers" ILL Request Results

(Frequency with which patrons stated certain results from their ILL requests for the preceding six months)

Result	Number of Responses	One Time	More than One Time	Total
Filled--Original		27	32	59
Filled--Photocopy		15	44	59
Refused		6	1	7

From the two new tables one can see that the ratio of multiple transactions to single transactions was higher in those instances where photocopies were received (2.13) than when originals were received (1.08).<sup>49/</sup> This suggests that ILL patrons who receive photocopies receive them with some frequency.

Although libraries and users report that originals make up a substantial portion of ILL transmittals and receipts, one should bear in mind that just as the original/photocopy mix varies among library types so, too, does it vary among types of material photocopied. Much of the debate about photocopying and copyright, and indeed the only library photocopying case which to date has been tried to a conclusion,<sup>50/</sup> concern the unauthorized photocopying of articles from serials, particularly from those styled here as scholarly, scientific, and technical (SST) journals.

49. The "multiple/single" ratio for originals is  $95/88=1.08$ ; for photocopies it is  $100/47=2.13$ .

50. Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), discussed in detail at II C(1), supra.

ILL requests for serial materials, which include "loose issues, bound volumes, and individual articles,"<sup>51/</sup> when filled, result in the transfer of a photocopy 91.2% of the time.<sup>52/</sup> In one year's time, 7,173,000 serial ILL requests were filled: 6,543,000 of those "fills" consisted of photocopies; 630,000 were originals. The opposite is true of books: 97.4% of the 9,439,000 filled requests were filled with originals rather than photocopies.<sup>53/</sup>

The parties draw different conclusions from these data. Librarians tend to discount the concerns expressed by publishers because, overall, most ILL "fills" consist of originals. Proprietors respond that the most serious copyright-photocopying problems concern serials, and those are the data which deserve the most attention. The King data do show that ILL transactions of books and "other materials"<sup>54/</sup> do not generally involve photocopying, but that does not reduce the importance of the serial data. It is there that the question of "balance" must receive serious scrutiny, since, clearly upwards of 6.5 million photocopies per year from serial materials are sent from one library to another. The data from which King calculated that statistic also reveal that librarians state that they receive permission from, or make royalty payments to, copyright proprietors for 1.1% of all serial photocopying and 0.6% of all ILL photocopying.<sup>55/</sup> It

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51. KR ILL Log Instructions at B-12.

52. KRT 3.4(a) & (b).

53. Ibid.

54. "Other materials" are those not classifiable as books or serials, including such materials as sheet music, photographs, or maps.

55. KRT 3.11.

thus may be calculated that fewer than 75,000 of the 6,543,000 serial-ILL-photocopy transactions are the subject of explicit proprietor permission. The rest are either authorized by the law or are infringements of copy-right.

Under the CONTU guidelines, libraries which receive photocopies of §108(d) material through ILL are required to:

maintain[s] records of all requests made by it for copies ... of any material to which [the CONTU] guidelines apply and shall maintain records of the fulfillment of such requests, which records shall be retained until the end of the third complete calendar year after the end of the calendar year in which the respective request shall have been made.<sup>56/</sup>

The extent to which libraries are complying with this requirement is uncertain. In examining KRT 2.18, concerning libraries' maintenance of ILL records, it is clear that libraries which keep ILL forms for more than three years (line "a" of the Table) and libraries which maintain counts of articles/ titles requested (provided such records are kept for the time required) (line "d"), are complying with the law. Since the time of retention is not specified in the latter entry, all one may safely say is that line "a" respondents are in compliance, line "d" respondents may be in compliance, and line "b" and "c" respondents (who retain ILL forms for less than three years) are violating the law unless they have other records

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<sup>56</sup>. CONTU Guideline No. 4, Conf. Rep. No. 1733 at 73.

which they retain for a sufficient time. Because of possible areas of overlapping among the lines of this table, all that is certain is that 51.1% of all libraries are clearly complying with the law and some smaller percentage (between 10 and 50%) is not keeping the required records.<sup>57/</sup>

The CONTU guidelines, which are the source of this record-keeping requirement, were created to cover what CONTU and Congress were told was a substantial majority of ILL serial transactions: those concerning articles less than five years old. Some data in the KR show that there is significant traffic in older works, to which the guidelines, by their very terms, do not apply. Of items requested via ILL where the publication year was recorded, fully 53% were more than five years old. In academic libraries, where serials comprised more than 60% of the ILL requests, 55.7% of the "year known" requests were for works more than five years old.<sup>58/</sup>

The frequency with which older materials are photocopied is also reflected in the user surveys. There, of patrons who recalled the publication date of the last item they had photocopied, 34% stated that it was more than four years old. In observing the specific works which the surveyed users were actually photocopying, the percentage increased to 45%.<sup>59/</sup> These results suggest that photocopying in libraries, by library staff or patrons, occurs in significantly greater quantities with respect to older materials than was previously thought. As is discussed elsewhere,<sup>60/</sup> there

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57. If all of the "d" libraries keep their records for a sufficient time, then there is 90.8% compliance; if none of them does, there is 51.1% compliance. It seems reasonable to assume that the truth lies somewhere in between.

58. KRT 3.3(a) & (b).

59. KRT 5.11 & 5.27.

60. See, text supra, IV A(4).

is substantial uncertainty in the library community about the legal status and rules to be followed, in the absence of CONTU-type guidelines, with respect to these older works. Given the already noted low payment/permission/refusal frequencies, it appears that this uncertainty is generally resolved in favor of making photocopies from such works.

The relationship of the increased automation of many library functions to the incidence of library photocopying, particularly in an ILL context, concerns many copyright proprietors. Their concern appears to be that an "all electronic" system, containing "on-line" bibliographic data bases (rather than printed indexes and union catalogues) with which a user may order photocopies on the same electronic equipment used to learn of an article's whereabouts, poses a much greater threat to them than conventional ILL activities. Clearly, such activities are more efficient (and, as functional mechanisms, arguably systematic) than an all paper, mail-based system. However, the King data show that there is a positive correlation between the number of computer searches<sup>61/</sup> performed in a library and the number of serials to which that library subscribes.<sup>62/</sup> Likewise, the data show a positive relationship generally between computer searches and ILL requests, and between serial subscriptions and ILL requests. While we accept, and repeat, King's caution concerning mistaking correlation for causality,<sup>63/</sup> the data do seem both to bear out and contradict the fears of the proprietors: libraries which do substantial computer searching of bibliographic data bases do make substantial quantities of ILL requests;

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61. See Questions 44 & 45, KR at A-18.

62. KRT 2.27.

63. KRT at 2-37.

but, they also subscribe to more serials than libraries which do less computer searching. A plausible explanation for this may be simply that large libraries, which have superior holdings and computer capabilities, draw users whose research needs exceed even the substantial resources of such libraries, thus causing them to be significant ILL borrowers. At all events, the data show that nearly half of all libraries (and 70.5% of SFP libraries) engage in computer searching, with 19.5% of the "computerized" libraries doing on-line document ordering. Whether this level of technology was foreseen by Congress in 1976 is a moot question. The issue to be faced today is whether the all-but-guaranteed further growth of such systems will, or should, permit the photocopying resulting therefrom to be subject to as little proprietary control as the KR data reveal to be true at present.

A library which does not possess a copy of a work desired by a patron need not always resort to making an ILL request to obtain a copy. In addition to the obvious route of buying a copy from a publisher or dealer, a library may seek out a commercial document delivery service. Such services provided libraries, in 1980, with just under two million documents for a total price of just under \$6 million.<sup>64/</sup> SFP libraries use these services more frequently and heavily than any other library type. They buy 96.5% of the documents sold to all libraries by such services, and make 94.8% of libraries' payments to them. This said, however, one might note that only one-third of SFP all libraries use such services.

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64. KRT 2.24.

The growth of ILL photocopying between 1976 and 1980 was roughly two per cent per year for all libraries and roughly four per cent per year for non-public libraries.<sup>65/</sup> The KR contains language indicating that these numbers did not comport with prior expectations. The interesting and unanswerable question is the extent, if any, to which this growth was limited by the enactment of the present copyright law. King hypothesizes that the law, budgetary pressures, and changing acquisitions patterns may all have limited that growth. It is probably less important to determine why ILL photocopying grew as it did during that period than it is to determine whether the present quantity of ILL photocopying without permission from copyright proprietors is compatible with a proper balance.

h. "Staff" Photocopying: Local & ILL.

(i) General Characteristics. As previously noted, much attention has been paid to photocopying in the ILL context. Section 108(g)(2) of the copyright law, its proviso permitting certain "interlibrary arrangements," and the CONTU guidelines, all address issues related to the ILL process. Witnesses from proprietary and library communities have emphasized ILL issues in their testimony before the Copyright Office. Nonetheless, the KR indicates that in all types of libraries, photocopying transactions of a local nature exceed ILL transactions with respect to all kinds of works. When all local and ILL photocopying transactions are compared, the former constitute 72% of the mix.<sup>66/</sup> Among library types, the range is

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65. KRT 3.7 and accompanying text.

66. Calculated from KRT 3.10 which shows (albeit in percentage terms) 5.3 million ILL photocopy transactions and 13.7 million local photocopy transactions.

from academic libraries (56% local) to special libraries (79.5% local).<sup>67/</sup> Among types of source items, 78.2% of book photocopying transactions are local, as are 65.3% of serial transactions.

(ii) Age of Works Copied. The photocopying done by library staff members, for all purposes, appears to have characteristics similar to ILL photocopying: a substantial majority are serial transactions, 25.3% involve copying of serial materials more than five years old.<sup>68/</sup> Again, library patrons seek and obtain copies of older material more frequently than was widely believed by the parties and, perhaps, by Congress and CONTU.

(iii) Notice of Copyright. The preparation of photocopies under the provisions of section 108 requires library compliance with certain terms set out in the law. As previously seen, libraries requesting ILL copies must certify to their supplying libraries that their requests comply with the CONTU guidelines,<sup>69/</sup> and supplying libraries should provide photocopies only to libraries which provide adequate certification. In addition to these ILL requirements, all "108" copies must include "a notice of copyright." The level of compliance with this requirement depends upon whether one believes, that this requires the reproduction of the statutory notice

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67. These numbers are slightly larger than those in the KRT because they reflect the "local" portion of those transactions which librarians classified as local or ILL. The "other" transactions, to which librarians did not assign either term, are here ignored, on the ground that the data from the classified transactions are more reliable than those concerning a type of transaction equivalent to "unknown." It was the intent of the Copyright Office that all transactions be labelled "local" or "ILL."

68. KRT 3.10.

69. For a discussion of the issues raised by the certification form drafted by the American Library Association, see, text supra, IV A(4).



of copyright,<sup>70/</sup> or, as library representatives have usually argued, that affixation to the photocopy of a warning that a work may be in copyright is sufficient.<sup>71/</sup> As can be seen in KRT 3.6, with respect to serials (copies from which comprise 94.1% of the ILL fills to which the table is addressed), 78.7% of the photocopies contained either the notice affixed by the publisher, the warning added by the library, or both. This ratio is very similar to the datum in KRT 3.11 which shows that, with respect to ILL and local copying, 77.8% of the serial materials bore a copyright notice on the original. It appears that libraries are affixing or ensuring the appearance of some type of "notice" on virtually all photocopies prepared from serial materials which bears a notice. If, however, reproduction of the "statutory notice" is indeed required, then compliance with respect to serials is poor, since only 21.5% of the serial fills contain a reproduction of the notice from the original.

The effect of a statutory copyright notice upon library patrons engaged in photocopying may be inferred from KRT 5.30. There one sees, for example, that roughly 30% of such patrons said they had never seen a copyright notice, that they did not know what it meant, ignored it, or otherwise paid no attention to it.<sup>72/</sup> While it is clear that the notice has rather precise effects with respect to copyright proprietors, and somewhat

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70. The form of such notices is set out in §§401-403 of the Copyright Act. The requirement generally is that a notice contain the word "copyright," the abbreviation "copr.," or a "c" inside a circle, together with the name of the copyright owner and the year in which the work was published.

71. For a thorough discussion of this issue, see, text supra, III A(3).

72. The text preceding KRT 5.30 shows that the users whose perceptions were tabulated as "other" gave the last two responses about half of the time.

less precise effects on libraries seeking to preserve their "108 status," it is less clear to what extent library patron behavior is affected by the presence of the copyright notice.

(iv) Photocopying Volume. The KR contains a large quantity of data concerning the volume of photocopying which occurs in libraries on an annual basis. The data, which appear at several different places, are of three major types: annual aggregate data, per-transaction data, and trend data. Each is important; and each gives its own perspective on the existence of a balance.

(A) Annual Aggregate Data. The 1980 data which are most important include the following items (many of which have already been set out in this chapter):

- . 4.97 billion "impressions" (pages) were made in libraries. (KRT 2.11 and surrounding text).
- . Two-thirds of all non-public libraries operated a "photocopy service." (KRT 2.12).
- . 91.2% of all libraries made ILL requests. (KRT 2.17).
- . 84.7% of all libraries received ILL requests. (KRT 2.19).
- . There were some 24.9 million ILL requests (KRT 3.3). Of the 5.3 million photocopies made to fill such requests, 0.6% were the result of payment to or permission from copyright owners. (KRT 3.11).
- . There were 22.6 million transactions in which libraries made one or more photocopies from a work for their patrons, their own collections, or for other libraries. (KRT 3.9). 1.1% of these transactions were the result of payment to or permission from copyright owners. (KRT 3.11).
- . During a six-month period, more than half of all library patrons made or obtained photocopies of library materials. (KRT 5.4).

These aggregate data show the extent to which photocopying has become significant to libraries and their patrons. They also show the extent to which photocopying transactions occur independently of any control on the part of copyright proprietors. Whatever one believes they show about balance, however, it is well to consider the "per transaction" and the "trend" data before reaching a conclusion.

(B) Per-Transaction Data. The aggregate data just discussed are the products of chapters two, three, and five of the KR. Results from chapter two are from the library questionnaire,<sup>73/</sup> whose completion was presumably based in many instances upon regularly-kept business records. Results from chapters three and five, however, are based upon transaction-by-transaction records kept either by librarians (the ILL and photocopying transaction logs of chapter three) or by employees of King Research (the user survey forms of chapter five). All of the per-transaction data are taken from these latter chapters, which means that their accuracy should be quite high since the records were made contemporaneously with the transactions.

In analyzing the data contained in KRT 3.9 through 3.13 it became clear that two somewhat contradictory statements could fairly be made about the photocopying transactions in which libraries engage. On the one hand, roughly two-thirds of all transactions (and roughly three-fourths of all serial transactions) are transactions in which one copy is made.<sup>74/</sup> While

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<sup>73</sup>. Appendix A to the KR.

<sup>74</sup>. KRT 3.10.

those transactions are not thereby necessarily lawful,<sup>75/</sup> it is clear that §108 authorizes only single-copy transactions.<sup>76/</sup> Whenever multiple photocopies are made from a copyrighted work, the transaction must be authorized by the copyright owner or §107 (fair use), or it will constitute an infringement of copyright.

The contradictory statement is that a surprisingly large number of multiple-copy transactions are reflected in KRT 3.9 through 3.13. One need only compare the column headings in KRT 3.9 and 3.10 (where the numbers of transactions are given by library and source type) with the numbers of copies made in those same transactions in KRT 3.12 and 3.13 to see, for example, that for all transactions, a mean of 4.2 copies per transaction obtains, while the mean for all ILL transactions is 3.2, and for all serial transactions, 2.9.<sup>77/</sup>

Out of concern that these means did not precisely describe the distribution of copies-per-transaction, the Copyright Office asked King to provide it with data divided more finely than in the tables in the KR. Those data are reproduced below and discussed immediately thereafter.

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75. "Related or concerted" copying (even of single copies) of which a library is "aware" is unlawful; so too is "systematic" copying unless authorized by the ILL proviso. Section 108(g)(1) and (g)(2). See, text supra, IV A (4)(c).
76. Section 108(a).
77. 95.4 million copies from 22.6 million transactions equals 4.2 copies per transaction; 17.0 million ILL copies from 5.3 million ILL transactions equals 3.2 copies per ILL transaction; and 38.0 million serial copies from 13.1 million serial transactions equals 2.9 copies per serial transaction.

TABLE K1

## Distribution of Copies Per Transaction

<u>A</u>	<u>B</u>	<u>C</u>	<u>D</u>	<u>E</u>	<u>F</u>
<u>Copies per Transaction</u>	<u>% of all Trans.</u>	<u># of Trans.</u>	<u>% with Copyright notice</u>	<u># of Trans. w/notice</u>	<u># of Copies from E</u>
1	69.5%	15,687,000	66.2%	10,385,000	10,385,000
2	9.0	2,032,000	58.0	1,179,000	2,358,000
3	3.7	844,000	47.1	398,000	1,194,000
4	3.5	797,000	61.8	493,000	1,972,000
5	1.8	402,000	54.3	218,000	1,090,000
6	2.1	483,000	63.2	305,000	1,830,000
7	1.4	316,000	61.5	194,000	1,358,000
8	1.3	291,000	57.7	168,000	1,344,000
9	0.8	178,000	59.4	106,000	954,000
10	1.0	214,000	46.8	100,000	1,000,000
11	0.5	104,000	61.7	64,000	704,000
12	0.6	129,000	44.3	57,000	684,000
13	0.5	104,000	56.3	59,000	767,000
14	0.4	99,000	53.7	53,000	742,000
15	0.3	70,000	53.8	38,000	570,000
16-20	1.1	239,000	60.3	144,000	2,304,000*
21-30	0.9	192,000	48.7	94,000	1,974,000*
31-40	0.4	84,000	39.2	33,000	1,023,000*
41-50	0.6	131,000	19.1	25,000	1,025,000*
51-100	0.4	95,000	30.9	29,000	1,479,000*
101+	0.3	72,000	25.0	18,000	1,818,000*

\* Assumes all transactions in this range were of the minimum number of copies in the range.

TABLE K2

Percent of Transactions, by Whether Notice on Original,  
by Copies Per Transaction

<u>Copies Per Transaction</u>	<u>Copyright Notice on Original</u>	<u>No Notice on Original</u>
1	73.3%	63.1%
2	8.3	10.1
3	2.8	5.3
4	3.5	3.6
5	1.5	2.2
6	2.2	2.1
7	1.4	1.5
8	1.2	1.5
9	0.8	0.9
10	0.7	1.4
11	0.5	0.5
12	0.4	0.9
13	0.4	0.5
14	0.4	0.6
15	0.3	0.4
16-20	1.0	1.1
21-30	0.7	1.2
31-40	0.2	0.6
41-50	0.2	1.2
51-100	0.2	0.8
101+	0.1	0.7

# of Transactions

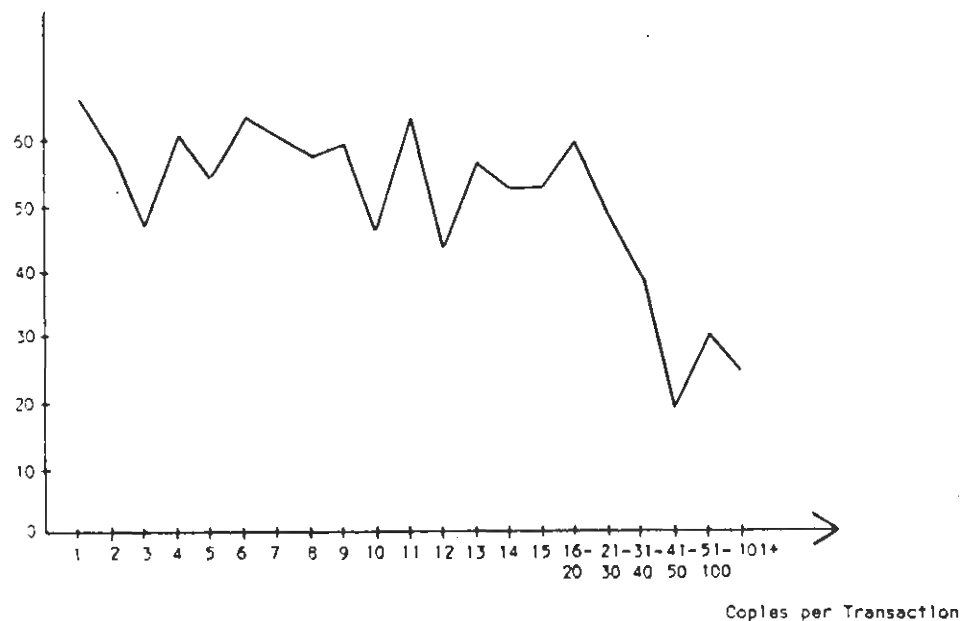


Figure K1

Distribution of Copies per Transaction in Which  
a Copyright Notice appears on the Original.

# of Transactions

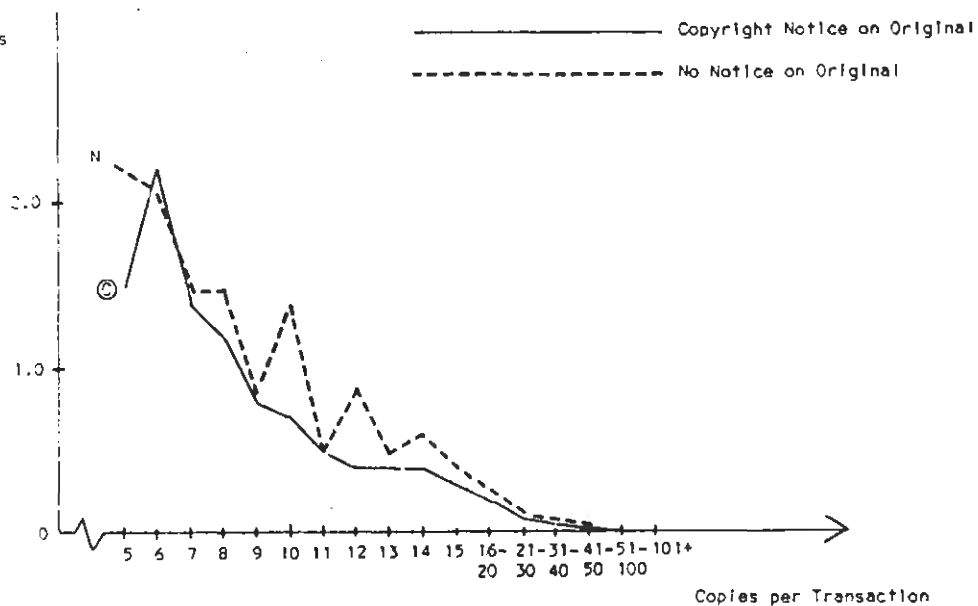


Figure K2

Percent of Transactions (5 or more copies), by Whether  
a Copyright Notice appeared on Original.

The data permit inferences to be drawn about the effect on the level of copying of the appearance in a work of the copyright notice.<sup>78/</sup> Table K2 shows that the presence of the notice increases, by about ten percent, the percentage of single-copy photocopying transactions. In multi-copy transactions, as shown in figure K2, the presence of the notice appears slightly to reduce photocopying activity at most levels.

Table K2 also shows that when the notice appears on the copied work, multiple photocopies are prepared in more than 25 percent of all transactions. As is discussed in chapter three of this report, §108 never authorizes the preparation of multiple photocopies of copyrighted works. And, of course, the preparation of one copy at a time is not always lawful, since if it is "concerted or related" or "systematic" (and not "saved" by the ILL proviso), §108 does not permit it.

As mentioned in the previous chapter, according to the data in Table K1, a conservative estimate of the number of copies prepared by libraries in 1980 in five-copy and larger transactions where copyrighted works are photocopied is 20,666,000. This estimate ignores the copies prepared in transactions in which two, three, or four copies are made, and assumes that all transactions tabulated by King as, e.g., 16-20 copies, resulted in the preparation of the minimum -- here 16 -- number of copies. Since no more than 1.1% of all transactions were the subject of permission or payment, it appears that the multiple-copy transactions reported here may represent substantial infringements of copyright.

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78. Although copyright may subsist in a work which bears no notice, the division in Tables K1 and K2 is based on notice since that is, or should be, instructive to persons desiring to make photocopies, and since §405(b) of the Copyright Act provides that persons misled by the absence of a notice from an authorized copy of a copyrighted work may avoid liability for infringements committed unless they have received actual notice that a claim to copyright in the work has been registered.



The curves plotted in Figure K2 show that at these "5 plus" levels the percentages of transactions are fairly close together and decline in a very similar manner for both "notice" and "no notice" copying. This suggests that the near-universal economic phenomenon of decreasing marginal utility, rather than copyright, accounts for the downsloping curve with respect to the "notice" transactions. To be sure, at most levels of copying the appearance of notice slightly reduces the incidence of copying, but as the graph in Figure K1 suggests,<sup>79/</sup> the effect of notice looks rather constant between two and twenty copies per transaction; only for transactions larger than that does the incidence of notice decline significantly as the copying quantities increase.

The data discussed above were not the subject of public comment since they were received by the Copyright Office in December, 1982. Earlier data, in which the division between "notice" and "no notice" copying did not appear, were presented to the Advisory Committee for comment. Most members expressed surprise at the incidence of multiple copying, and it was suggested that in some instances the logs kept by librarians, from which the data were taken, may have contained some entries reflecting page numbers in the space provided for entering the number of copies made.<sup>80/</sup> There is no way to determine whether, or how often, this occurred, but the smoothly downsloping curve (in Figure K2) concerning "notice" transactions suggests that it was not a frequent occurrence, at least in this

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79. This graph presents the data from Column D at Table K1 in graphic form.

80. The instructions concerning the "copy number" entry appear in the KR at B-5.

important area. The user survey<sup>81/</sup> and previous work by King<sup>82/</sup> show that the number of pages made in an "average" photocopy transaction is between eight and ten.

Library patrons who make photocopies of library materials appear, on the whole, to make fewer copies per transaction than do the library employees whose copying behavior has just been discussed. "Entrants" recalled making a mean of 1.7 copies per transaction.<sup>83/</sup> (Of those who could recall whether the last item they had photocopied bore a copyright notice, 69% stated that it had).<sup>84/</sup> "Copiers," whose copying activity occurred simultaneously with the recording of the data, made a mean of 2.6 copies per transaction,<sup>85/</sup> from works which bore a copyright notice 65.8% of the time.<sup>86/</sup>

(C) Trend Data. These data, concerning changes in library experience and practices between 1976 and 1980, have drawn much attention in the communities which are interested in this report.<sup>87/</sup> The most important trend data include the following:

- Book expenditures increased 7% in real terms (i.e., after allowing for inflation). Serial expenditures increased by a real 12%, but public libraries' serial expenditures declined 1% in real terms. (KRT 2.7).

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81. See KRT 5.14.

82. 1977 King Report.

83. KRT 5.15.

84. KRT 5.12.

85. KRT 5.29.

86. KRT 5.28.

87. See, for example, Publishers Weekly, (June 11, 1982), at 14, and, App. VII at 64, 108, and 127.

- The number of photocopy machines per library increased 33% overall, from 4.5 to 6.0. The increases in academic and federal libraries were each 70%, while the "public" increase (28%) was the second smallest. The number of "coin-op" machines per library increased overall by 31%. Again, the percentage increases in academic and federal libraries were the largest, while here the "public" increase was the smallest. (KRT 2.9).
- 62.2% of the libraries having "reserve" operations reported changing their practices for copyright reasons. (KRT 2.16).

An important caveat is in order: trends were calculated from data presented by libraries in 1981 concerning both 1976 and 1980. Two other trends, concerning ILL staff photocopying, are the results of calculations by King Research in which it compared 1980 data gathered under its contract with the Copyright Office with data it gathered for its 1977 report prepared for three other agencies. As King notes<sup>88</sup>/ there is less than perfect congruity between the samples from the two surveys. This means that the three trends discussed are extrapolated from the "trend experience" of the entire 1981 library sample, while the next two trends represent extrapolations from samples taken at different times, whose memberships were substantially different, and, most important, who were asked substantially different questions. Because the 1977 report considered a class of transactions styled "intrasystem," whereas this report concerns only local and ILL transactions (with the former intrasystem

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<sup>88</sup>. KR at 3-23.

transactions now called "local"),<sup>89/</sup> the ILL trends projected by King may be entitled to less confidence than those described by libraries in the data they supplied in 1981.<sup>90/</sup>

- The number of serial interlibrary loan requests which were filled with photocopies appeared to increase, overall, by 9%. Public libraries appear to have experienced a decrease of 22%; if they are omitted from the calculation, the overall increase is 17%. (KRT 3.7).
- The number of photocopies made by library staff members appears to have decreased, overall, by 16%. If public libraries, who report a decrease of 23%, are omitted, then the overall decrease becomes 8%. Special libraries (SFP and SNP together) report a decrease of 45%; academic libraries an increase of the same percentage. ILL photocopying appears to be up 62%, but serial photocopying is down 21%. (KRT 3.14).

Although some of these trend data appear contradictory or confusing, there are some insights to be gained from them, particularly when taken in conjunction with the rest of the KR. The real increase in expenditures by libraries shows that, whatever the effects of photocopying, libraries are increasing their acquisitions budgets even as their overall budgets are under great pressure. Recent and severe budgetary constraints on public libraries are all too well-documented. Reductions in staff positions, hours of operation, services, and purchases in San Francisco and Boston were the subject of two articles in the same issue of a respected

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89. See "Transaction Type" instructions in the KR at B-6.

90. This uncertainty is not a criticism of King's methods. It simply is a function of the changes between the 1977 and 1981 surveys, particularly with respect to the changes in types of photocopying transactions. If that had not occurred, the data would be much more comparable than they are.

library periodical.<sup>91/</sup> Nearly annual substantial reductions in the Denver Public Library's services between 1976 and 1982 caused that city's library commission to institute substantial fees for nonresident users.<sup>92/</sup> These constraints may well be responsible for the fact that public libraries reported the only real decrease in any expenditures: a 1% decrease for serials, as against an overall increase of 12%.

Evidence of greater fiscal pressure on public libraries than on others may also appear in the machine population trend: the second smallest percentage increase in machines per library, and the smallest increase in "coin-ops" occurred among these libraries. Together with the decrease of 22% experienced by such libraries with respect to ILL photocopy "fills," the common thread through all these trends is the reduction in growth patterns and outright reductions in several kinds of services which have occurred in public libraries. The King data offer no way to discern the extent to which such reductions share with increased copyright awareness (or other reasons) the "responsibility" for the reported 22% ILL decrease or the 23% decrease reported in staff photocopying. Thus it may be informative to examine the data in KRT 3.7 and 3.14 both in the aggregate and by library type, so as to see trends in those sectors not as greatly affected by budget cuts as were public libraries.

In the non-public sector one sees stronger growth in serials acquisitions expenditures, machine populations, and ILL photocopy "fills." An important question, which can not be answered from the data alone, is:

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91. See Bourne, Surviving the Present: San Francisco Public Library, 55 Wilson Library Bull. 736 (1981) and Hickey, Boston Public Library: Balancing the Books, 55 Wilson Library Bull. 743 (1981).

92. See Cayton, Daring to be Different: The Denver Public Library, 56 Wilson Library Bull. 504 (1982).

Assuming budget considerations have reduced all types of public library services, what can one make of the widely varying data in KRT 3.14 which offer such apparently anomalous results as a 21% reduction in serial photocopying by all libraries, a 45% reduction in staff photocopying by special libraries, but a 62% increase in ILL photocopying by all libraries?

Considering the change in scope of the term "ILL" between the surveys in 1977 and 1981, the absence of certain previous data, and the solid evidence of substantial growth in machine populations, probably few sound conclusions can be drawn from this data.

It may be, for example, that "special" staff photocopying is down because of the use of document delivery services by SFP libraries. Or it may be that "local" copying by staff members is down because of increased patron reliance on coin-operated machines. There are, unfortunately, no 1976 data from which to draw any comparisons to test these hypotheses.

A common perception among those who have commented upon the KR is that the data show that there has been

an overall decline of 16% in the number of copies made of books, serials and other materials between 1976 and 1981.<sup>93/</sup>

(v) Library Justifications for Photocopying.

The quantity of photocopying done by and in libraries is not the only issue to be discussed in addressing the "balance" question. The legal status of the copying which takes place, however large or small the quantities, is also of fundamental importance. KRT 3.11 tabulates the judgments made by librarians, as they filled in the photocopying transaction logs, concerning their legal bases for the photocopying they did. In

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<sup>93</sup>. Publishers Weekly, (June 11, 1982) at 19.

examining the Table one should note that the instructions for the photocopying transaction logs included a note that the "copying status" entries (which give rise to the Table) were to be reviewed by someone "with familiarity with copyright issues."<sup>94/</sup> This was done to ensure that data reflecting the positions taken by libraries concerning the legality of various photocopying transactions would be provided by persons with the best possible understanding of copyright.

KRT 3.11 suggests that in certain instances the law is being misunderstood or disobeyed. The five columns in the Table were designed to include all possible lawful justifications for the preparation of a photocopy of a work: fair use, §108 (including the CONTU guidelines), permission without payment, payment for permission, or the absence of copyright in the work. Nonetheless, more than two million transactions (just under 10% of all staff photocopying) fell outside these five categories. As against this volume of arguable infringements, barely more than one percent of all transactions were performed with permission from the copyright owner, with or without payment. The extent to which these transactions reflect a serious misunderstanding of the law can not be learned from the data, but the scope of the problem appears significant.

One of the most surprising results shown in KRT 3.11 is that librarians invoke the provisions of §107 (fair use) and §108 with virtually equal frequency to justify photocopying for ILL purposes.<sup>95/</sup> Whether this reflects confusion or the staking out of a strong position that fair use is broadly available on a recurring basis when §108 privileges have been

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<sup>94</sup>. KR at B-6.

<sup>95</sup>. The legal grounds for ILL transactions are stated to be fair use, 43.3%; section 108, 45.1%.

exhausted is, again, unclear. If it should be the latter, however, then the intended balance is in serious jeopardy, because it should be clear to all concerned that ILL photocopying is systematic and lawful only to the extent permitted by the proviso to subsection 108(g)(2), and only when its terms (rather than the more nebulous terms of §107) are met. As discussed elsewhere in this report,<sup>96/</sup> fair use should properly have a very small role to play in ILL photocopying. While reasonable people may disagree how large or small the role of fair use in ILL should be, at all events it is not available for more than 40% of all ILL transactions.

(vi) Permissions and Royalty Payments.

Only 12.2% of all libraries reported ever asking for permission to photocopy during 1980<sup>97/</sup> and, as KRT 3.11 shows, permissions (both free of charge and for royalty payments) existed for only 1.1% of all staff photocopy transactions. One may question whether Congress intended to invite the active participation of creators and copyright owners in such a tiny fraction of the photocopying activity which takes place in libraries.

Librarians sometimes state that requesting permissions is time-consuming and unproductive because responses from publishers are often not forthcoming. The King data do not bear this out. First, fewer than one-eighth of all libraries ever ask for permission at all. Second, it appears that most requests are answered. While there is no identity of requests, permissions, denials, and pending/nonresponses in KRT 2.21, one may see that denials generally amount to no more than three percent of all requests and that all libraries, on the average, had fewer than three requests to

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<sup>96/</sup> See text supra, IV A(4)(c).

<sup>97/</sup> KRT 2.21.



which publishers had not responded. Since 95.5% of the requests appear to result in responses (i.e., permissions or denials), it is fair to assume that the overwhelming majority of "pending" requests will ultimately receive responses.

Still fewer libraries ever pay photocopying royalties (5.9%)<sup>98/</sup> and fewer transactions are the subject of payments (2/10 of 1%)<sup>99/</sup> than is the case with permissions in general. And, as the publisher survey showed, the amount of money derived from photocopying royalties is so small as to be nearly invisible as a fraction of total revenues.<sup>100/</sup>

i. Other User Data.

Of all patrons entering all types of libraries, 62.8% of them had made or obtained photocopies of library materials in the preceding six months.<sup>101/</sup> Such "photocopy patrons" (PP's) appear to do a substantial amount of photocopying. Indeed, the most common response from PP's was that they had made or obtained photocopies from such serials seven or more times during the six-month period.<sup>102/</sup> While such copying is usually done on a single-copy basis, its cumulative effect should not be downplayed.

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98. KRT 2.22.

99. KRT 3.11.

100. SST journal publishers show mean photocopying revenues of \$200 for 1980, as against \$602,000 mean total revenue. \$200 is 3/100 of 1% (\$3 per \$10,000) of \$602,000. (KRT 4.9).

101. KRT 5.4. Indeed, of the 21 libraries where users were surveyed, at fully 18 of them (and at all the non-public libraries) a majority of the entering patrons had that level of photocopying involvement. (KRT 5.5).

102. KRT 5.7.

Patrons make or obtain photocopies of library materials for a variety of reasons. Overall, job-related reasons (including teaching) were given slightly more often than study-related reasons.<sup>103/</sup> But there was a sharp distinction between the predominance of job-related copying in federal libraries ("entrants": 88.6%; "copiers": 91.3%) and SFP libraries ("entrants": 68.5%; "copiers": 77.8%) and the frequency of study-related copying in academic ("entrants": 65.8%; "copiers": 62.5%) and public ("entrants": 37.9%; "copiers": 42.7%) libraries. Congress may need to consider the extent to which copyright owners should be obliged to contribute, without compensation, to the money-making activities of those library patrons whose photocopying is job-related.

Between one-quarter and one-fifth of all patrons ask their libraries to obtain works for them from other libraries.<sup>104/</sup> Their requests are almost always filled, with rare reports by users that copyright considerations led to refusals.

Similar percentages of patrons asked their own libraries to make them copies from their own collections.<sup>105/</sup> More than 90% of such requests were filled,<sup>106/</sup> with the only "copyright refusals" occurring with respect to music, for which libraries do not currently have any §108 privileges when it comes to copying for patrons.<sup>107/</sup>

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103. KRT 5.10 & 5.25.

104. KRT 5.17 & 5.21.

105. KRT 5.16 & 5.21.

106. KRT 5.16 and text at 5-31.

107. 17 U.S.C. §108(h)(1980).

All in all, it appears that for a significant portion of the library user community, the library has become the location for acquisition of as well as access to copyrighted materials.

### 3. KR Chapter Four. Publisher Survey.

King Report Table 4.2 shows that the population of publisher respondents is distributed differently from the U.S. publisher population. Although the Copyright Office is disappointed with the response level, the distribution difference may be of little consequence, since publishers of SST journals and books are well represented, with the only serious underrepresentation occurring with respect to publishers of "other serials only," i.e., publishers of neither non-SST periodicals nor books. Given the emphasis of and on SST journal publishers, the presence of substantial amounts of data from them permits some conclusion to be reached.

The data from the publisher survey show mixed signals, as do the library and user data. On the one hand, revenues of serial publishers showed substantial real increases (i.e., increases after allowing for inflation) between 1976 and 1980: 41% for all serial publishers and 50% for the publishers of SST journals.<sup>108/</sup> During the same period the ratio of serial "births" to "deaths" was 3.4 to 1,<sup>109/</sup> and of journals reporting changes in circulation, 73% of SST journals and 83% of other serials reported increases.<sup>110/</sup>

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<sup>108.</sup> KRT 4.9.

<sup>109.</sup> KRT 4.5.

<sup>110.</sup> KRT 4.6.

As is recounted elsewhere,<sup>111/</sup> authors and publishers created the Copyright Clearance Center, Inc. (CCC), to facilitate photocopying beyond the bounds of §§107 and 108 and to authorize it in institutions not eligible §108 privileges. While the growth of the CCC has been slower than publishers might like, by October, 1982 some 5,367 SST journal titles were registered.<sup>112/</sup> In 1980, 43.5% of the SST titles published that year were registered with the CCC.<sup>113/</sup>

The other side of the publishing picture is shown in some of the circulation, permissions, and royalty data. The almost three-quarters of all SST journals which have circulations of under 10,000<sup>114/</sup> are vulnerable to any events that would even marginally reduce their circulations. With photocopying revenues averaging only \$200 per SST publisher in 1980,<sup>115/</sup> any photocopying of such limited-circulation works that amounted to a substitution for subscriptions or purchase of authorized reprints, could have disastrous effects.

In 1980, SST journal publishers received a total of \$665,000 in photocopy royalty revenue from all sources, which was almost 70% of all publishers' photocopying revenue.<sup>116/</sup> SST publishers may have forgone as much as \$27 million in revenue as their "share" of the \$38.6 million forgone by all publishers because of multiple photocopying.<sup>117/</sup> This would

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111. See, text supra, IV D(1)(b)(i)

112. Letter from CCC dated December 10, 1982.

113. KRT 4.5

114. KRT 4.6.

115. KRT 4.9. One should also note that payments in 1976 were so low that the calculation of a mean was not performed by King.

116. KRT 4.11.

117. See, text supra IV A(4)(c).

publishers because of multiple photocopying.<sup>117/</sup> This would amount to almost \$8,000 per SST publisher, roughly 1.3% of such publishers' mean total revenues. While that may not sound like much, it is forty times larger than the present mean of \$200 per SST publisher, and an amount of some consequence. Further, since KRT 4.11 shows how little of the present pool of royalty monies comes from libraries, one might suspect that fair compensation for all photocopying beyond §§107 and 108 might have a substantial economic effect.

Although SST publishers report that permission requests either went up or stayed about the same from 1976 to 1980,<sup>118/</sup> the miniscule incidence of permission requesting seen in KRT 3.11 suggests that there remains room for real growth in the practice. That librarians should be reluctant to ask for permission from publishers seems somewhat shortsighted, particularly since 72.8% of the publishers of serials -- whose works are the subject of the bulk of staff photocopying<sup>119/</sup> -- grant all their permission requests in full.<sup>120/</sup> Only 34% of all serial publishers (43.7% of all SST publishers) ever asked for any payment for photocopying.<sup>121/</sup>

The incidence of permission/royalty activity (1.1% overall, with a maximum of 3.2% among special libraries) is so low that it is not surprising to learn, as one does in KRT 4.11, that only 3% of all photocopy royalty payments come directly from libraries, with 9% coming through the CCC. After all, only 5.9% of all libraries made any payments, and only

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117. See, text supra IV A(4)(c).

118. KRT 4.12.

119. KRT 3.10.

120. KRT 4.13.

121. Ibid.

5.6% belong to the CCC. The overall effect of these statistics appears to be that the publishers -- as all copyright owners -- play an extremely small role in library photocopying. Publishers see this as demonstrating the absence of the intended balance; librarians see it as reflecting the intent behind §§107 and 108.

Interesting data concerning the structure of the publishing industry are found in KRT 4.4. Roughly two-thirds of all publishers, and nearly three-fourths of SST journal publishers, are organized on a not-for-profit basis and are so treated by the Internal Revenue Service. That does not mean that they are indifferent to unauthorized photocopying. Some of the founders and strongest advocates of the Copyright Clearance Center are non-profit professional societies. They provided witnesses at several hearings who made clear their position that proprietary rights, as recognized in permissions requests and royalty payments, were important to their publishing.<sup>122</sup> This is understandable, since any publisher, whether profit-seeking or not, can only stay in business so long as it recovers its costs of production. The apparent health of the industry suggests that as of 1980 that was generally occurring.

Cost recovery can occur, of course, through a variety of means, including subscription charges, advertising revenues, and, particularly in the case of SST journals, "page charges." In something of a reversal of the classic author-publisher role, certain periodicals require payments from authors (or their employers or other sponsors) in order to publish their works. Although the record permits no firm conclusion concerning

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<sup>122</sup>. See, e.g., Anaheim Hearing at 6 (statement of William Koch) and New York Hearing at 139 (statement of E.K. Gannett).

this, the Copyright Office believes that page charges are most likely to be imposed by professional societies. They comprise nearly half of all SST journal publishers, but only 15.1% of all other serial publishers.<sup>123/</sup>

SST journal publishers also appear to charge higher subscription prices than publishers of other serials, with 32% of individual SST 1980 subscription prices being over \$20.00, while only 14.4% of other serials were at that level.<sup>124/</sup> The imposition of a higher subscription price to institutional subscribers — chiefly libraries — by SST publishers may be seen in KRT 4.8. Here, fully 51% of the subscription prices exceed \$20.00. Although price charges between 1976 and 1980 were not tabulated for every such journal, King calculates that institutional prices rose approximately 12% per year during that time.<sup>125/</sup>

Additionally, as regards SST publishers' cost recovery, one may calculate that publishers who publish only SST journals derive roughly 10% of their total revenue from sales, whereas this percentage for other serial publishers ranges from 47% to 59%.<sup>126/</sup> The sale of reprints is another source of publisher revenue. In 1980, serial publishers sold 34.37 million article reprints, 73% of which were sold by SST publishers.<sup>127/</sup> Of the 25.2 million copies sold by SST publishers, some 63% of them were sold to authors at the time their articles were published. Indirect sales of SST reprints, through other commercial organizations, such as information

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123. Calculated from KRT 4.4.

124. KRT 4.7.

125. KR at 4-22.

126. Calculated by dividing data from row "C" in KRT 4.10 by data in row "E."

127. KRT 4.14.

brokers or document delivery services, were much smaller than the direct sales referred to above -- only 92,000 copies.<sup>128/</sup> The publisher of Scientific American was quoted on our record to the effect that annual reprint sales of articles declined from approximately 3.9 million in 1969 to 1.4 million in 1979, even though the scope of the reprint service was enlarged in 1978, when all articles from the publication became available via reprint.<sup>129/</sup>

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128. KRT 4.15.

129. New York Hearing at 99-100 (statement of Alen Wittman).



## VI. NEW TECHNOLOGY

Photocopying has been treated as a new technological phenomenon for over a quarter of a century. In a sense, photocopying technology is in its dotage; the new reprographic reproduction equipment — computers, telefacsimilie machines, electro-optical disc systems and the like — appearing in offices, schools, industry, government agencies, libraries and even the home are tools for the creation as well as the copying of works, the production of "documents," the direct acquisition of materials, and the capability of modifying or rearranging their contents.

The copying machine does not exist in a vacuum. Its place in society and the growing concerns of authors and copyright owners over its use are shaped by other technologies with which the copier may interact. Within the last decade, Americans have witnessed the introduction of a vast new array of information products made possible through technological advancements — computer data bases and general use computer software for commercial and personal computers, video cassettes and discs, subscription television programs, and electronic videogames. This onslaught of new works and methods of dissemination shows no sign of abating; the future appears to hold even more promise as teletext and videotext systems are commercially introduced, personal computers and computer networks move into the home, and serious experiments are conducted in electronic publishing. Many of these technologies already have raised questions of how best to protect authors rights in the environment they are creating.

To the consuming public the photocopy machine and the emerging information technologies serve similar broad purposes — furnishing ever easier access to information, including that contained in copyrighted works. To the copyright owner, they pose what looks a like a "Hobson's choice;" new markets will open, but the loss of control over the reproduction right, inherent in "machine-readable" information products, will make present concerns over paper based photocopying seem insignificant. One should note in this discussion that whatever photocopying is permitted by §108, the specific privileges dealt with by that section are limited to traditional forms of facsimile reproduction and do not apply to other new technological uses of copyrighted works.

The photocopy machine operates in a paper-based system of information distribution largely governed by traditional copyright principles. If the user has one hard copy in hand, a limitless number of reproductions easily can be made. As a system of information distribution, photocopying is subject to the inherent limitations of any paper based system —securing the original hard copy, storing the original and the photocopies, and delivering the photocopies to the user. Each step necessarily consumes valuable resources, and each may have copyright consequences.

The emerging new technologies utilize electronics to avoid many of the physical limitations of the paper based system and raise new copyright problems of their own. Computer data bases, for example, enable users to locate relevant information within seconds from among thousands of entries. Storage in machine-readable form has the potential to reduce space, handling, and preservation problems associated with maintaining usable hard copies. The wide variety of electronic delivery systems being

developed today in conjunction with computer, telephone, cable, and satellite communication systems greatly enhance the ability of the user to receive needed information quickly.

The efficiencies already brought about by new information technologies have been heralded as the dawning of a new era<sup>1/</sup> that will affect every aspect of our lives. Futurists predict that the workplace will become decentralized, many employees will perform their duties at home, and literary works will be tailored to a great extent to meet the individual needs of the user.

Intellectual property -- patents, trade secrets, and copyrights and information products embodying them -- will be central to the successful social management of these predicted changes.<sup>2/</sup> To cope in this increasingly complex technological environment, individuals will need ready access to an ever-growing body of information distributed via electronic means directly to their homes.

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1. Toffler, *The Third Wave* (1980); see also, the cautions of Librarian of Congress Boorstin, *The Republic of Technology* (1978)

"The tantalizing, exhilarating fact about great technological changes is the very fact that each such change (like the invention of controlled atomic fission) seems somehow to be a law unto itself, to have its own peculiar vagrancy. Each grand change brings into being a whole new world. But we cannot forecast what will be the rules of any particular new world until after that new world has been discovered. It can be full of all sorts of outlandish monsters; it can be ruled by a diabolic logic. Who, for example, could have predicted that the internal-combustion engine and the automobile would spawn a new world of installment buying, credit cards, franchises, and the annual models--that it would revise the meaning of cities, and transform morality by instigating new institutions of no-fault reparations?

2. It recently has been estimated that about 50% of all goods and services produced in the United States are information-related. Information Industry Association, Understanding U.S. Information Policy, the Infrastructure Handbook, p. 9, (1982).

Against this backdrop, it is clear that photocopying and the newer technologies must be considered in the context of the changing realities of the total information distribution system. Photocopying revolutionized the paper-based system of information dissemination; and as newer electronic technologies grow in importance, print on paper will lose its preeminent position in the dissemination of information. Legal controls and commercial practices pertaining to "copying" will have to be adapted as further "performance," "display," "reproduction," and "derivative work" questions arise. Possibly new technologies, by reducing the role of print in the publication of information, will diminish the importance of photocopying to a point where it has little effect on "publishing." New technology could also be applied to the photocopy machine to assist in the monitoring of mass photocopying. Most likely the broad copyright-photocopying problems to which this report is addressed will be transferred to the new technologies, rendering their solution even more difficult.

The solutions to these problems are not readily apparent; but whether the copyright law remains a viable incentive to creators and an effective facilitator of the dissemination of information will depend in large measure on how well the law can adapt to the changing environment. This adaptation, it must be stressed, is not limited to elevating authors' rights. It concerns, as profoundly, the continued viability of limited exemptions in the law in new contexts where there is no long-standing jurisprudence and the overall public policy favors non-discriminatory access to information. To identify areas of stress on the copyright system

in the future, this section of the report surveys the impact of the emerging technologies on librarians, publishers, and the present Copyright Act.

#### A. Computerization of Library and Reference Services

A modern scholar is often confronted with a frustrating dilemma; while automated library card files and computer data bases make it easy to locate a multitude of references on almost any topic, securing the works themselves is a different matter. The physical item typically must be purchased, retrieved from the library's collections or borrowed from another institution. Words such as "out of print" or "not on shelf" can mean weeks of delay in securing needed material.

The different levels of automation of the library functions of information retrieval and document delivery are the basis for this anomaly. Reference services to identify and locate information have been revolutionized by the introduction of computer technology, principally by great library institutions, but the time needed for retrieval and delivery of the works that embody the information is, today, still fixed at about the time of Gutenberg.

Technological innovation in publishing has gone more to the improvement of manufacturing processes for copies than to an infrastructure that displaced copy making and copy distribution. Innovation has challenged the efficiency of publication practices by intensifying demand for access in terms which conventional publishing practices cannot now fully meet. Thus, to obtain a copy of desired information, a researcher is usually confined to the traditional methods of either purchasing a paper

copy from the publisher or another trade source or securing a copy from a library; methods that do not keep pace with the virtually instantaneous speed with which information sources can be identified.

Librarians have tried to point out to publishers the relationship between new technological uses of copyrighted works and the failure of publishers to meet user needs on user terms:

Librarians and the educational community would prefer to cooperate with the publishing industry. There would not be so much photocopying, etc., in libraries and in school systems if publishers would offer a reprint service that met the needs of librarians and the educational community. With the available modern technology, publishers should be able to provide, on a competitive basis, copies of their publications required by the schools, without imposing a licensing or fee system on library and educational institutions. The film strips, charts, chapters, or pages of books, and the reprints of articles could all be supplied by the publishers on a cost-plus-royalty basis, low enough to encourage or entice libraries and school districts to purchase multiple copies from them rather than photocopy them. Publishers could cooperatively become involved in "demand" publishing; the production of books only after they have been ordered. To arrange for this service, the publishers should issue catalogues of their books and list the cost for copies by page or chapter, in bulk sales or otherwise. New books could list such price information on the verso of the title page. Publishers could establish cooperative regional offices to service these requests or develop other alternative systems. Eventually, these systems could be linked up with computer storage and retrieval units that would provide practically instantaneous transmission in remote, ephemeral, or hard-copy form. They could also provide microforms if requested. Once the dissemination of copy is centralized, a logical solution to the photocopying problem is possible. Publishers claim that the user of copyrighted materials is becoming a publisher by the use of photocopying machines. One way to remedy this is for the publisher to establish an improved publishing service that will provide photocopies and service at a competitive rate. Publishers have not changed their mode of operation basically since the days of Gutenberg. Some publishers are preparing for the future by merging with electronic companies. But they will have to change their mode of operation radically if they want to survive. Just as

laborers are being warned that they will not get tomorrow's jobs with today's skills, publishers should take similar heed.<sup>3/</sup>

1. The Private Sector in the Information Industry.

The automation of reference services has presented the private sector with entrepreneurial opportunities as information vendors. Many firms have entered this field as suppliers or sellers of computer data bases and data base access services. In addition, smaller companies have found a niche supplying copies of referenced works for a fee.

The vending of computer data bases and data base access is such a new industry that it is unclear which, if any, of the numerous companies entering the field ultimately will dominate.<sup>4/</sup> As of 1980, there were more than 1,000 data bases available for computerized searching via a variety of information access or service systems; and more businesses appear to be considering entering the field.<sup>5/</sup>

There are two principal types of products: source data bases and bibliographic data bases.<sup>6/</sup> Source data bases give the user direct access to source material, such as census data, market-research information, or the full text of legal materials. Users of source data bases typically are businessmen, economists, financial professionals, and lawyers. Biblio-

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3. 1 IFLA Journal 47-48 (1975).

4. The primary business of companies with interests in computer data bases is diverse. One article identified the following companies as having activities in the field: Lockheed, Mead, ABC, Boeing, Chase Manhattan, Citicorp, Control Data, General Electric, G.T.E., McGraw Hill, Dow Jones & Co., Dun & Bradstreet, New York Times Co., Time Inc. and Xerox. 101 Fortune 227, (May 5, 1980).

5. 208 Science (April 4, 1980).

6. Fortune, supra note 4.

graphic data bases identify and give the user the location of the information which is sought. In a sense, they are highly efficient card catalogs. The library community is one of the principal markets for bibliographic data bases.

The commercial availability of computer data bases has had a considerable impact on the library community.<sup>7/</sup> In order to provide better reference services, libraries increasingly find it necessary to subscribe to one or more of the commercially available data base access services.

The online information retrieval revolution has raised many policy issues in the library and copyright communities; one of the most controversial questions among librarians is whether libraries should charge fees to users for online searching.<sup>8/</sup> Another issue is who will protect the public interest if access to reference services essentially becomes available only to those who can afford to pay?<sup>9/</sup>

Important copyright policy issues also factor into online retrieval activities. Historically, one of the most significant of those was the point at which copyright liability might attach to computer use of copyrighted works, at the time of input or at output? Others concerned rights of reproduction, remote display and transmission. The legislative history of the 1976 Copyright Act and the Congressional action following CONTU'S recommended deletion of the original §117 have all indicated a

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7. Jacob, Dodson, and Finnegan, Special Libraries and Databases, 72 Special Libraries 103, (1981).

8. Vendors of computer data bases secure a significant portion of their revenues from charging for searching time. Thus, when a library uses a data base, the expense either must be paid by the patron or be absorbed by the library itself.

9. A recent conference attended by librarians and private sector information specialists raised but did not resolve this very point. See, Jacob, Dodson and Finnegan, supra note 7.



clear intent to apply copyright principles to computer uses of copyrighted works, including data base operations. As in other areas, the extent of the protection afforded and the applicability of fair use in specific instances remain open to speculation.

Companies supplying document delivery services also participate in private reference services. Document Retrieval Sources and Services for 1981 lists 127 private sector non-library document delivery services.<sup>10/</sup> These companies typically serve the needs of major corporations.<sup>11/</sup> The amount of business undertaken by commercial document delivery services appears substantial. The KR estimates that in 1981 these companies delivered 1,946,100 documents to libraries,<sup>12/</sup> while seven million inter-library loan requests were filled in 1981 through photocopies.<sup>13/</sup> While charges for commercial document delivery services vary, it has been estimated that the average price for a 10-page article for normal service is \$12.<sup>14/</sup>

In general, companies offering commercial document delivery services fall into one of two categories. A few, such as the Institute for Scientific Information and University Microfilms, are quite large and secure the copies, or in some cases the originals that they supply, from extensive collections which they maintain. Most, however, are small companies which often utilize the resources of nearby major academic or

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10. Strizich, and Lawhun, Document Retrieval Sources and Services, 1981.

11. Information entrepreneurs stake claims at IACUNY, 104 Library Journal 1199, (June 1, 1979).

12. KRT 2.24.

13. KR at 3-19.

14. Wood, Private Sector, Non-library Document Delivery Services, Prepared for the Association of Research Libraries, p. 3 (unpublished 1982).

research libraries. The extent that these companies tend to follow the letter of the copyright law by paying copyright royalties to publishers is unknown. Some of them apparently pay for copying or otherwise obtain full copyright permission; others make little or no effort at copyright compliance.

## 2. Creation of Information by the Government

The growth of the information industry has not been limited to the private sector. The circumstances underlying the creation of government information are so varied that there appears to be no accurate estimate of how much information is created either directly by governmental agencies or indirectly under government sponsorship.<sup>15/</sup>

With a large government presence in the information field, conflicts with private sector interests are inevitable. To some extent, the copyright law mitigates against conflict by generally denying works of the United States government the benefits of statutory copyright protection.<sup>16/</sup> Nevertheless, on occasion, government works have been brought within the copyright law. The Standard Data Reference Act, for example, permits the Secretary of Commerce to secure copyright in certain information products on behalf of the United States to recover some of the

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15. National Commission on Libraries and Information Science, Task Force Report on Public Sector/Private Sector Interaction in Providing Information Services, p. 20 (1982).

16. 17 U.S.C. §105 (1980).

- (a) it does not consider the revenue foregone for multiple-copy transactions involving the unauthorized preparation of fewer than five copies at a time,
- (b) it does not consider the revenue foregone for any single copying which is concerted, related, or systematic (and not permitted by the proviso), and
- (c) it assumes that all of the transactions tabulated in Table K1 a range of copies per transaction (such as 16-20) were of the smallest number in that range (in this example, 16).

The revenue here is described as foregone rather than lost since it is clear that publishers often grant permission to make photocopies without charge.<sup>100/</sup> And, although \$38.6 million may not be much if spread across the entire publishing industry, it becomes significant when one realizes that in 1980 SST journal publishers received almost 70% of all photocopying royalty revenues<sup>101/</sup> (which comports with the belief that their works are the most heavily photocopied) and that such publishers had mean total revenues of \$602,000 in that year.<sup>102/</sup>

Finally, the technological developments discussed elsewhere in this report<sup>103/</sup> will permit high speed, inexpensive, fully automated access to copyrighted materials. When such progress creates completely new modes of access -- as by CRT display of the full texts stored in computerized data bases or optical disks -- then full copyright liability should attach.

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 was copied, and in which five or more copies were made. Each copy was then assigned a "foregone royalty" equal to CCC's 1982 average per item royalty rate of \$1.87.

100. [X-ref to King & Transcript].

101. See KRT 4.11 and 4.16. SST journal publishers received \$665,000 of the \$961,000 in photocopying royalties received by all serial publishers; publishers who published no serials received less than \$35,000 in such royalties. (These are industry totals, not means or averages).

102. KRT 4.9.

103. See, text infra, VI.

When, however, it simply speeds up, routinizes, or otherwise enhances the manual, mail-oriented, creation and distribution of photocopies to which section 108 is directed, then one should be careful to consider whether the quantitative constructions of "systematic" which inhere in the CONTU guidelines, remain appropriate. The Conference Committee noted, with respect to future developments, that the CONTU Guidelines:

"deal with an evolving situation that will undoubtedly require their continuous reevaluation and adjustment," and that they "are a reasonable interpretation of the [(g)(2)] proviso... in the most common situation to which they apply today."<sup>104</sup>/

The Copyright Office believes that the guidelines, if followed, continue to set out an acceptable balance between proprietors and users with respect to "conventional" ILL activities. As technology changes the framework in which such activities and their successors occur, however, the trend toward systematization must be accompanied by a trend toward full copyright liability.

##### 5. Copying by Users.

Most of §108 deals with copying by libraries, but the intended balance can be affected by the activities of users, some of which are addressed in §108. When library patrons make copies of copyrighted materials in libraries, whether on coin-operated or other machines, subsections (f)(1) and (f)(2) address such copying.

The rule in (f)(1) is straightforward: libraries and their employees are not liable for copyright infringements which occur on photocopy machines or other "reproducing equipment" on library premises, provided two conditions are met:

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<sup>104</sup>. Conf. Rep. No. 1733 at 71-72. (Emphasis added).

- (1) the copying ("use of reproducing equipment") is unsupervised; and
- (2) the equipment displays a notice that the making of a copy may be subject to the copyright law.

The first condition requires attention. It is subject to diverse interpretations, and compliance is less easy to determine than in the second: it is often easier to determine whether a warning is displayed than whether copying is supervised. And, although the temptation is great, in considering (f)(1) to speak in terms of "unsupervised machines," the law's distinctions are based not on the physical machine, but on the use made thereof. Thus, on different occasions, the uses made of one machine may be supervised and unsupervised.

The supervision question raises several issues. Each, of course, is a variant of the question "is this copying supervised?" The principal dispute centers on the extent to which employees of for-profit corporations, when they prepare photocopies of copyrighted materials within the scope of their employment, and on machines on their company's library's premises, are using the equipment in a "supervised" manner. The AAP declared its position that such copying is always supervised and that the library (which in such cases is legally indistinguishable from the corporation) is therefore always liable for any infringements committed by the copying employee.<sup>105/</sup>

The Special Libraries Association, many of whose members work in such libraries,<sup>106/</sup> provided two witnesses at Copyright Office Hearings.

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<sup>105.</sup> See Chicago Hearing at 71-72 (statement of Charles Lieb) and App. II, Part 2, at 42-45.

<sup>106.</sup> In 1979, 44% of SLA members worked in for-profit organizations. SLA Supplementary Statement (Comment Letter 80-5-28) at 2.

Neither worked with an SFP library. Neither could answer questions concerning practices in such libraries. A formal, clear presentation from the SLA concerning not only "supervised," but also concerning "direct or indirect commercial advantage" and "systematic" is unfortunately absent from the record. While no formal "missing witness" rule applies to our hearings, the absence of clear testimony has left the record in these areas somewhat one-sided. We understand the SLA's general position to be that §108 speaks in terms of "libraries" and does not make the distinctions urged by the AAP. We are not certain that the issue is as simple as either side proposes, but, as discussed earlier,<sup>107/</sup> we believe the law does make distinctions among libraries according to their relationship with profit-seeking entities.

With respect to "supervision" in SFP libraries, the Copyright Office believes that an employee's use of a photocopy machine in such libraries is likely to be "supervised," even if he is using the machine on his own initiative provided his copying is job-related. There is a small but important body of copyright law suggesting this result, either on the theory of respondeat superior<sup>108/</sup> or on a broader "doctrine of related defendants." As to the latter, the leading treatise states:

Even in the absence of an employer-employee relationship one may be liable as a related defendant if he has the right and ability to supervise the infringing activities and also has a direct financial interest in such activities.<sup>109/</sup>

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<sup>107.</sup> See, text supra, III A(4) and (5).

<sup>108.</sup> Shapiro, Bernstein & Co. v. Veltin, 47 F. Supp. 648 (W.D. La. 1942); Buck v. Newsreel, Inc., 25 F. Supp. 787 (D. Mass. 1938).

<sup>109.</sup> 3 Nimmer on Copyright §12.04[A] at 12-37, citing several cases in fn. 18.

And, as the recent Sony case has shown, "it is not necessary that an alleged contributory infringer has actual knowledge that the activity which he makes possible constitutes copyright infringement."<sup>110/</sup>

Copying done by corporate employees, within the scope of their employment, and in furtherance of the corporate mission (thus meeting the "direct financial interest" standard) likely is, for §108 purposes, "supervised." Thus, if it is infringing (because it is not authorized by §107, §108, or the copyright owner), the parent company is liable for infringement.

"Supervision" in non-SFP libraries raises different questions. We assume, for the most part, that patrons in such libraries are less likely to be employees of the entity which owns or runs the library than is the case in SFP libraries. Here, therefore, the issue is less complex. In the absence of an employer-employee relationship (or any other facts giving rise to library liability) then the question is, simply, does the library or its employees supervise the patron copying activities. When a patron takes a book or periodical off the shelf, or receives it after ordering it at a desk, and thereafter photocopies it, such copying is unsupervised unless the library or its employees exercises some control over it. This is not, however, carte blanche for libraries to immunize themselves from liability by diverting arguably infringing copying to machines used by patrons.

A patron who prepares copies completely on his own is making the type of "unsupervised use" to which §108(f)(1) is directed. He obtains no immunity for himself under (f)(1) (as may the library) or, indeed, under

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<sup>110</sup>. Id. at 12-34, citing Universal City Studios, Inc. v. Sony Corp. of America, 659 F.2d 963 (9th Cir. 1981), cert. granted, 50 U.S.L.W. 3973 (1982).

any of §108. If his copying is within the scope of fair use, by virtue of §107 he has no copyright liability; if his copying "exceeds fair use" (§108(f)(2)), he will be liable. If, however, he first asks a library to perform photocopying of an extent which would not be fair use (if performed by him), and the library responds, "we can not do that for you, but you should use that machine over there," then the copying he performs may well be "supervised," thus making the library liable, along with the patron.<sup>111/</sup> The test is one of fact: did a library exercise sufficient control over the patron's activity to make the copying "supervised." As elsewhere, questions of fact are resolved on a case-by-case basis, but the adoption of agreed-upon rules could go a long way toward setting the framework for such decisions, while at the same time decreasing the uncertainty inherent in any lawsuit.

To recapitulate: libraries, whether associated with profit-seeking organizations or not, may receive immunity from liability for the unsupervised infringements of their patrons. The question whether a given use is supervised will depend on the totality of the circumstances, and the answer will depend, among other things, upon whether the copying patron is an employee whose conduct is within the scope of his employment. If a use is, in fact, unsupervised, the final issue raised by (f)(1) is whether the equipment displays the required notice.<sup>112/</sup>

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<sup>111.</sup> See, generally, the discussion of vicarious liability in 3 Nimmer on Copyright §12.04 (1982).

<sup>112.</sup> This notice is not the same as the one promulgated by the Copyright Office in implementing §108(d)(2) and (e)(2); it is simply "a notice that the making of a copy may be subject to the copyright law."



Librarians reported that almost 93% of the coin-operated machines on their premises bear the required notice.<sup>113/</sup> While unsupervised uses of non-coin-operated machines may occur, this measurement indicates good compliance. Testimony and comment letters also reflected high rates of compliance.<sup>114/</sup> Library patrons whose photocopying activities were actually examined were using machines bearing a notice 83% of the time.<sup>115/</sup> The language of (f)(1), in which the notice requirement appears in a proviso, means that libraries are liable for even the unsupervised infringements of patrons who make their copies on machines without the notice.<sup>116/</sup> If 17% of the machines used by patrons lack such notice, then potential library liability for patron activities may be higher than one would expect.

At all events, the warning serves to protect libraries from liability. A comment that the warning caused a public relations problem and required staff time to explain its meaning to resentful patrons<sup>117/</sup> suggests some misunderstanding in this regard. Likewise, the testimony of a publisher that, upon asking a librarian the meaning of a posted warning, he was told "Don't worry about it,"<sup>118/</sup> suggests a less than full understanding of the law. Indeed, if a library does indicate to patrons that the warning is meaningless, then either the copying done thereafter should be

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113. KRT 2.10.

114. See e.g., N.Y. Hearing at 361 and App. VI, Part 2, at 124.

115. KRT 5.21.

116. [Sutherland on Provisos].

117. App. IV, Part 2, at 10.

118. N.Y. Hearing at 101.

regarded as supervised, or the notice should be treated, with respect to such transactions, as being absent. In either case, the library should share with its patron any infringement liability.

By far the better practice is the one described by Elizabeth Usher, a librarian, in response to a question concerning the propriety of the advice not to worry about the notice, in which she indicated that she would say to a user:

Read it and you will know that you are responsible for any copyright infringement.<sup>119/</sup>

An item of interest related to photocopying performed by library patrons is the extent to which those libraries least likely to have photocopy machines on their premises have such machines within walking distance, i.e., "down the hall, on another floor, within a building close by."<sup>120/</sup> Only 40.8% of SNP and 50.2% of SFP libraries have machines on their premises,<sup>121/</sup> but 73.4% of the SNP's and 94.1% of the SFP's have machines within walking distance.<sup>122/</sup> While copying which occurs physically outside the library is not, strictly speaking, "108" copying, it may have significant effects on the balance between creators and users.

Finally, with respect to user copying, the reasons given by patrons for the copying they do are interesting. They suggest that the implicit subsidy for educational purposes inherent in both sections of the law concerning photocopying, sections 107 and 108, may simultaneously serve as a subsidy for the business community as well. Although section 107, the

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<sup>119.</sup> See Id. New York Hearing at 285.

<sup>120.</sup> King Report at A-11.

<sup>121.</sup> KRT 2.3.

<sup>122.</sup> KRT 2.13.

law governing whether a patron's unauthorized photocopying is infringing or not, clearly favors "nonprofit educational purposes" over uses "of a commercial nature,"<sup>123</sup>/ the statistics which are available show that much of the photocopying done by library patrons is described as being "necessary for their job" or "helpful but not necessary for their job."<sup>124</sup>/ Indeed, if one considers photocopying related to teaching as job-related, then this was the reason given by more patrons than any other. Something between 35% and 40% of the patron photocopying appears to be done in furtherance of patrons' employment. Whether this level of "non-educational" copying is within the intended balance is unclear. What is apparent is that in an environment where much copying occurs, it is difficult to impose practical, enforceable distinctions as to those types of photocopying favored by the law and those disfavored. In an environment of greater copyright awareness, it could prove otherwise, but only a reduction in the levels of confusion and uncertainty previously discussed can lead to such an environment.

#### B. Copying Elsewhere.

In addition to the copying and distributing of material by libraries subject to §108, a great deal of photocopying and distributing is done by copy shops, commercial information brokers, and libraries that do not qualify for §108 status. This copying may have a significant effect on the balance between the rights of creators and the needs of users of copyrighted materials; for, in effect it raises a fundamental question: are

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123. Section 107(1).

124. See KRT 5.10 and 5.25.

the boundaries of the §108 privilege fair for the included beneficiaries and to the excluded users?

1. Copy Shops: including the Gnomon, Tyco, and N.Y.U. Cases.

In January 1981, the National Association of Quick Printers (NAQP) represented by Philip Battaglia, its Executive Vice-President, estimated that quick printers in the United States number approximately 15,000 and that growth had been about 25 percent per year. He divided these into three types: (1) full-service quick printers who do duplication, copying and typesetting; (2) instant printers who usually do only duplicating and copying; and (3) copy shops which do only photocopying.<sup>125</sup>/

The NAQP representative indicated that while convenience copying was widespread and an integral part of the industry, the majority of quick printers — shops that duplicate, copy and typeset — attribute only 7% of their business to so-called convenience copying, i.e. where the customer does his own copying and either pays a clerk or inserts coins in the machine.<sup>126</sup>/

The NAQP representative pledged the cooperation of quick printers with copyright owners but stressed that there were too many problems for the staff to police violations of the copyright law, especially since these problems often arose through a customer's violation of the copyright law without the printer's knowledge. He cautioned that if current suits against copy shops become widespread, the entire industry will suffer.<sup>127</sup>/

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<sup>125</sup>. New York Hearing at 203-205 (statement of Philip Battaglia).

<sup>126</sup>. Id. at 204-205.

<sup>127</sup>. Id. at 207.

In a typical transaction, Mr. Battaglia noted, the customer is given a written price quotation that includes a statement that copyrighted material can not be copied. Not every quick printer inserts the warning; and, even if the statement is in the price quotation, it is not clear that the customer's acceptance of the price quotation means acknowledgment of the warning.<sup>128</sup>/

Proprietors have expressed concern that library patrons frequently copy library materials by checking them out and having photocopying done at a nearby copy shop. During the regional hearings, most librarians either did not discuss the issue or indicated they were not aware of the existence of copy shops close to their facilities. Two witnesses, one from the University of Texas<sup>129</sup>/ and one from UCLA,<sup>130</sup>/ observed that there were flourishing copy shops close to their campus.

So far there have been three cases involving the unauthorized reproduction and distribution for profit of copyrighted material by commercial copy services. In Basic Books, Inc. v. Gnomon Corp.,<sup>131</sup>/ the defendant, a company engaged in photocopying, had several business locations. Most were near colleges and universities. Plaintiff alleged that Gnomon's photocopying of copyrighted material was without authorization of the copyright owner and infringed the copyright in those works -- regardless of any fair use or §108 privileges the user (or the library from which the material copied came) might have asserted. The terms of a consent decree

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<sup>128</sup>. Id. at 215-216.

<sup>129</sup>. Houston Hearing at 57 (statement of Neill Megaw).

<sup>130</sup>. Anaheim Hearing at 89-90 (statement of James Cox).

<sup>131</sup>. 1980 Copyright Law Decisions (CCH) para. 25, 145 (D. Conn. 1980).

required Gnomon to cease making multiple copies of the same copyrighted material for either the same or different persons without express permission from the copyright owner or a certification from a faculty member that the copying order is within established educational copying guidelines.<sup>132</sup>/ Gnomon was also required to post a copy of those guidelines in a prominent position in each of its places of business.

In Harper & Row Publishers, Inc. v. Tyco Copy Service,<sup>133</sup>/ a company that offered photocopying services to the public, but catered especially to college students, was charged with copying and selling excerpts from a copyrighted textbook without permission. In a consent decree, the same district court involved in Gnomon impressed the same restrictions on the copying of copyrighted material as in the earlier case.

Although the copyright owners prevailed in the Gnomon and Tyco cases, as one publisher observed these litigations consumed considerable resources, without recovery of either statutory damages or attorney's fees.<sup>134</sup>/

On December 14, 1982, nine publishers filed a copyright infringement suit in the United States District Court, Southern District of New York, against New York University (NYU), ten of its faculty members, and an off-campus copy center. This is the first suit charging a university and

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<sup>132</sup>. See H.R. Rep. No. 1476 at 68-70.

<sup>133</sup>. 1980 Copyright Law Decisions (CCH) para. 25,230 (D. Conn. 1981).

<sup>134</sup>. He noted, however, that the defendants were supposed to pay royalties. N.Y. Hearing at 42-43 (statement of Martin Levin).

some of its faculty with violating §§107 and 108 of the copyright law. Plaintiffs are asserting that copyrighted materials, books, or parts of them, are copied without permission and used as class texts.<sup>135/</sup>

## 2. Commercial Information Brokers.

In addition to services offered by NAQP members, some companies themselves sell copies of documents to the public. Generally these document delivery companies fall into two categories: (1) those that maintain large and extensive collections of materials from which to provide documents to the public, and those which do not, and therefore must procure the source documents before selling them to the consumer. The former are frequently larger operations than are the latter. By estimate, the second group presently handles about 70% of all document requests received by all non-library private sector suppliers.<sup>136/</sup>

This business is profitable and competitive. The King Report estimated that during 1980, libraries ordered 1,946,100 documents from commercial document delivery systems. Most of these documents, 1,879,400, were ordered by SFP libraries; 38,200 documents by academic libraries; and only about 7,100 by public libraries. The King Report found that in 1980 alone U.S. libraries spent approximately six million dollars on commercial document services.<sup>137/</sup>

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135. Harper & Row Publishers, Co. v. Squibb Corp., No. 82 Civ. 2363 (S.D.N.Y., settlement agreement dated November 19, 1972).

136. James Wood, Private Sector, Non-Library Document Delivery Services 2 (prepared for the Association of Research Libraries).

137. KRT 2.24.

### 3. Non-§108 Libraries.

Libraries that do not qualify for §108 limitations <sup>138</sup>/ are another source of copying. Despite the discussion found in the legislative history,<sup>139</sup>/ the dividing line between §108 and non-§108 libraries is still a matter of dispute.

The principal conflict concerns libraries in for-profit organizations: these libraries insist that they are eligible for §108 privileges since, unlike copy shops, the copying does not involve any direct commercial advantage;<sup>140</sup>/ and their collections are sufficiently open or available to the public to satisfy the other requirement of §108(a).<sup>141</sup>/ Proprietors argue that all copying by libraries in for-profit organizations requires authorization, except in instances where copying is isolated and unrelated to other copying.<sup>142</sup>/ Proprietors point to the CCC as the collecting vehicle through which for-profit organizations should pay for their copying.<sup>143</sup>/

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<sup>138</sup>. Libraries that do not meet the requirements of 108(a), either because they copy with the purpose of direct or indirect commercial advantage, or they are not open to the public. For the complete text of 108(a), see text infra, III A ( ).

<sup>139</sup>. See H. Rep. No. 1476 at 74-75.

<sup>140</sup>. See Chicago Hearing at 183-4, (statement of William Budington).

<sup>141</sup>. See Chicago Hearing at 181-6 (statement of William Budington); at 191 (statement of Beth Hamilton). Also see Houston Hearing at 15-26 (statement of Barbara Prewitt).

<sup>142</sup>. Chicago Hearing at 71 and 77-78 (statement of Charles Lieb).

<sup>143</sup>. Id. at 71-80.



The King Report estimates that in 1980 there were about 3,370 special for-profit (SFP) libraries in the United States;<sup>144</sup>/ King also estimates that about 19.8% of these SFP libraries make royalty payments on photocopies.<sup>145</sup>/ And, while the percentage of transactions on which payments are made is higher for SFP libraries than for any other type of library, royalties are only paid for about 0.5% of SFP transactions.<sup>146</sup>/ The AAP testified that few corporate libraries clear copying through the CCC, and those were probably not paying for substantial copying for which payments should be made.<sup>147</sup>/

The AAP and E.R. Squibb in recent months settled a dispute concerning Squibb's unauthorized and uncompensated photocopying of materials. The parties agreed upon a procedure for reporting and paying for photocopies of material from journals and other published material registered with the CCC. Central to the settlement was Squibb's agreement to register with the CCC as a user.<sup>148</sup>/ The AAP reports that the parties consider the procedure adopted to constitute a model for resolving some photocopying issues in companies with extensive research facilities.<sup>149</sup>/

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144. KRT 2.2.

145. KRT 2.22.

146. KRT 3.11.

147. Chicago Hearing at 72-76, 86-87 (statement of Charles Lieb). See also text infra, IV D(1)(b)(i) for the latest CCC data.

148. It should be noted that a similar settlement was reached earlier with the American Cyanamid company. Publisher's Weekly, May 14, 1982 at 114.

149. AAP Press Release, November 22, 1982.

### C. Copyright Proprietors.

The copyright law gives exclusive rights, including the rights to reproduce and to distribute a work, to "the copyright owner." This term broadly includes the particular owners of particular rights under a copyright.<sup>150</sup> / Section 108(i), however, refers to a "statutory balancing of the rights of creators, and the needs of users." [emphasis added]. It is apparent that, in addressing the question of balance, neither creators nor users, per se, have been heard from in quantity.

The situation with respect to creators is a special one. At all stages of consideration of literary photocopying questions, including this review, authors of literary works have been vigorously represented by the Authors League of America. Throughout, the League has been the principal vehicle for communicating the position of authors on the full range of copyright issues. The problem in representation arises only in relation to librarians' assertion that the authors of scholarly, scientific, and technical (SST) literature, have different attitudes toward the existence, ownership, and exercise of copyright in their works than authors of non-SST materials and that the League represents principally the latter class.

To be sure, many authors, especially contributors to SST publications, are individually often motivated primarily by advancing learning, gaining audience for their findings and views, and enhancing the reputation of themselves and their institutions. To these authors, usually employed, and often academics, income from publication is secondary, if relevant at all. In the case of academics, his or her publication record is usually relevant to appointment, and always to tenure; and that is the principal

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<sup>150</sup>. 17 U.S.C. §101 (1980).

incentive. Of course, a given author of this kind will have altogether different expectations about his or her journal contributions and about his or her textbooks and treatises. From the latter, he or she expects income, indeed, that is usually the major reason such works are created. And the revenues from textbooks vastly exceed that from trade titles.<sup>151/</sup>

In cases where authors are indifferent to income, nothing prevents them from disclaiming copyright or dedicating their works to the public domain. Some do. In addition, permissions to copy can be generously given.<sup>152/</sup>

Other authors expect or depend either partially or wholly upon income from their writings.

That having been said, all authors of books or articles depend upon a publishing infra-structure. Copyright sustains this infra-structure; for, it engrosses not only the author's right, which he or she may forego, but also the publisher's, and allows the publisher thereby to recover the costs of doing business. In some cases, it also allows profit; in other cases, where profit is not a goal, it enables survival.

Consequently, to observe that authors and publishers are of different kinds is useful, but does not resolve the question of what the scope of copyright protection should be, nor what exemptions, including those for photocopying, should be provided. It does afford an explanation of why, on these issues, publishers sometimes speak as proxies for authors and libraries for their patrons.

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<sup>151</sup>. In 1979, text sales comprised 72% of the text-trade mixture. Congressional Research Service, Economic Concerns Relating to the Elimination of the Manufacturing Clause of the U.S. Copyright Law. (1981), Table 10 at 60.

<sup>152</sup>. See text infra IV D(1)(a).

# 1. Publishers.

The King Report classified library photocopying by type into book, serial, and other.<sup>153/</sup> The publisher survey addressed both book and serial publishers. This survey revealed that the revenues of serial publishers increased between 1976 and 1980: 41% for all serial publishers and 50% for the publishers of SST journals.<sup>154/</sup> During the same period the ratio of serial "births" to "deaths" was 3.4 to 1.<sup>155/</sup> Of the journals reporting changes in circulation, 73% of the SST journals and 83% of other serials reported increases.

Librarians emphasize that they have not decreased their serial subscriptions.<sup>156/</sup> The KR bears this out. On the other hand, over 6.5 million photocopies of serial material are sent from library to library each year; few of them (1.1%) are paid for or authorized.<sup>157/</sup>

Most of the proprietors testifying at the regional hearings were publishers of SST journals. There is evidence that these journals are being photocopied extensively. On fact, one publisher reminded the audience at the Washington Hearing that books were also being copied.<sup>158/</sup>

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153. KRT 3.10.

154. KRT 4.9.

155. KRT 4.5.

156. Anaheim Hearings at 61, 86 (statement of Norman Dudley).

157. KRT 3.11.

158. 2 Washington Hearing at 136 (statement of Charles Butts).

Most SST journals have limited circulations.<sup>159</sup>/ Their primary source of income is library subscriptions.<sup>160</sup>/ They perceive themselves to be especially vulnerable to photocopying. Although the KR indicates growth for SST and other journals, there was, some evidence that SST publishers had suffered decreases in subscriptions they believed traceable to photocopying. One publisher reported that his sales had dropped from 1,500 copies in 1970 to 250 in 1979-80, and traced this drop to the growth of reprography, noting that he now sells a subscription to only one institution within a certain area.<sup>161</sup>/ Another publisher reported that revenues were less than anticipated because a number of subscribers purchased individual subscriptions and made further copies to distribute to committee members instead of placing an institutional subscription and receiving twenty copies.<sup>162</sup>/ Dr. Koch of the American Institute of Physics reported an overall decline in subscriptions had gone from 2 to 3% in the last few years; he also noted that library subscriptions had remained reasonably constant while individual membership subscriptions had dramatically decreased.<sup>163</sup>/

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159. Almost 75% of all SST journals have circulations under 10,000. KRT 4.6.

160. See KR at 4-1.

161. Anaheim Hearings 100-3 (statement of Sol Grossman).

162. App. V, Part 2, at 20-21.

163. Anaheim Hearing at 32-33.

At the same time that publishers testified that it was difficult to prove that library photocopying was causing economic harm,<sup>164/</sup> they also asserted that such proof was not necessary. The chairman of AAP even charged that a resolution by a library association calling for proof of economic harm was "a subterfuge."<sup>165/</sup>

Because the factors affecting sales volume are multiple, it is difficult to prove that photocopying has caused economic "harm." And indeed no one has yet offered a test, definition, or measure of what constitutes economic harm. Serial publishers' revenues are rising; new serial titles are appearing. Beyond that, nothing more can be said, absent a definition of "economic harm." More revenues to publishers and more serial titles are no more illuminating than more pages photocopied in libraries.

## 2. Authors.

a. Royalty "issue." Librarians questioned the right of publishers to press complaints about non-payment for photocopies, observing that few authors whose works are photocopied receive royalties and many are not paid for the work initially.<sup>166/</sup>

It is also true that authors did not come forward saying, "We want our royalties." Instead, publishers claimed royalties. The testimony is mixed, but it does reveal that some publishers share royalties depending on the nature of the publishing, the type of work, and the cost. Most

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<sup>164</sup>. This may explain part of their reluctance in responding to the King survey of publishers. See the statement of Allan Wittman, rejecting the proposition that publishers are obligated to show harm as a condition of copyright. New York Hearing at 103.

<sup>165</sup>. 1 Washington Hearing at 84-85 (statement of Townsend Hoopes).

<sup>166</sup>. App. III, Part 2 at 60.

publishers at the New York and Washington hearings testified that they shared royalties ranging from a minimal amount to as high as 50%.<sup>167/</sup> The University of Texas Press divides royalties 50-50.<sup>168/</sup> One literary magazine -- the New Yorker -- reported paying 100% of all fees received for copying, reprinting, or reproduction of the material to the author.<sup>169/</sup>

Usually, however, scientific publishers pay no royalties. Dr. Koch of the American Institute of Physics (AIP) testified that AIP authors did not share any income from royalties or subsidiary rights.<sup>170/</sup> The American Chemical Society (ACS) only pays authors royalties for books and not for the articles published in its primary journals. Authors must sometimes pay page charges in order to have their works published in some journals.<sup>171/</sup>

Another publisher of scientific materials reported that although he paid a 30% royalty to the society whose members' works he published, he was not sure whether any of this was distributed to the individual author.<sup>172/</sup> In a 1977 CONTU hearing one distributor of republished materials testified that many publishers did not want to be paid for use of their materials because it was not worth the recordkeeping.<sup>173/</sup>

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167. 1 Washington Hearing at 59, 133; 2 Washington Hearing at 84, at 141, at 199-200.

168. Houston Hearing at 40 (statement of Dr. John Kyle).

169. 2 Washington Hearing at 104 (statement of Janet Muir).

170. Anaheim Hearing at 11, 38.

171. Houston Hearing at 97, 103 (statement of Dr. Michael Bowen).

172. Anaheim Hearing at 105-9 (statement of Sol Grossman).

173. Transcript CONTU Meeting No. 17 at 81 (Statement of Dr. Eugene Garfield).

Publishers declared that royalty payments were necessary in order for the publisher to survive.<sup>174/</sup> A representative of the ACS expressed concern that "photocopying practices, if they do not return revenues to publishers, can lead to steep subscription price increases ... threaten the publishing enterprise. Without financially healthy journals there would be nothing to photocopy."<sup>175/</sup>

b. Duality of Author's Position on Royalties. To get a broad range of views on library photocopying, the Copyright Office placed announcements of the regional hearings in several periodicals.<sup>176/</sup> Despite these announcements, very few authors appeared or even sent comments. Those who did were usually educators.<sup>177/</sup>

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174. See Houston Hearing at 90, (statement of Michael Bowen); at 34-35 (statement of John Kyle); App. V, Part 2, at 20-21.

175. Houston Hearing at 90 (statement of Michael Bowen).

176. They included: Author's League Newsletter, Publishers Weekly, Chronicles of Higher Education, and American Libraries.

177. This lack of response on the part of authors may be due to several factors:

- (1) Authors may feel that their views are being adequately expressed by publishers or organizations such as the Author's League.
- (2) The authors with the highest general (non-photocopying) royalty expectations — the authors of trade best sellers — perceive only a small photocopying threat.
- (3) The authors of the works which are most heavily photocopied are not objecting to photocopying since their primary purpose is dissemination of ideas.
- (4) Most of the authors of the works photocopied extensively do not generally receive royalties.



Authors nevertheless were resourcefully, perceptively, and articulately represented throughout these debates by the Authors League. However, since SST journals are the works about which there is great photo-copying-copyright sensitivity, one might note that the authors of their articles are unlikely to belong to the Authors League.

Organizations like the AIP and ACS presented evidence that the primary purpose of their journals is to disseminate articles widely. ACS states dissemination to be the primary purpose and that their authors want to show themselves and their institutions at the forefront of research,<sup>178/</sup> but they also viewed copyright protection as facilitating that primary purpose.<sup>179/</sup>

Because payments for photocopying are meager, the question of how much of those small amounts reach the author does not materially affect the present examination of "balance."

#### D. Modes Of Compliance.

##### 1. For copies made in libraries.

a. Permission in advance. Where copying is believed not to be authorized by §108, a user or librarian can ask the copyright proprietor for permission to copy. Testimony as to the efficacy of this method was mixed. Since including the proper information on the request is essential to timely treatment by the copyright proprietor, the Copyright Office believes that a standardized form to elicit all essential information should be used. Members of the library community have been amenable to

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<sup>178</sup>. Houston Hearing at 89, 106 (statement of Dr. Michael Bowen).  
See also Anaheim Hearing at 6 (statement of Dr. William Koch).

<sup>179</sup>. See, e.g., Houston Hearing at 102 (Dr. Michael Bowen); Anaheim Hearing at 8-20 (statement of Dr. William Koch).

publishers drafting a standard form;<sup>180/</sup> Publishers, however, are concerned that antitrust problems might be encountered in mutually settling on a standard form for all such requests. Consequently, no standard form has been adopted. The AAP has nevertheless published and distributed guidelines<sup>181/</sup> to help the requestor present all essential information.

Publishers suggest that this form should include the following:

1. Title, author and/or editor, and edition of materials to be duplicated.
2. Exact material to be used, giving amount, page numbers, chapters and, if possible, a photocopy of the material.
3. Number of copies to be made.
4. Use to be made of duplicated materials.
5. Form of distribution (classroom, newsletter, etc.).
6. Whether or not the material is to be sold.
7. Type of reprint (ditto, photocopy, offset, typeset)<sup>182/</sup>

Librarians have circulated these suggestions.<sup>183/</sup>

Today most major publishers have a department or person to handle permission requests.<sup>184/</sup> Some librarians complained about the length of response time<sup>185/</sup> or that response was never received.<sup>186/</sup> However, publishers

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180. See note 63 *infra*

181. According to Carol Risher, AAP based their form on what member publishers said was necessary. By January, 1981, 26,000 copies of this form had been sent out, 16,000 of them to all of the school districts in the United States.

182. App. II, Part 2, at 111.

183. ALA Model Policy Concerning College and University Photocopying for Classroom, Research and Library Reserve Use. 7 (March 1982).

184. See generally discussion by the Permission Panel, New York Hearing 221-275.

185. Houston Hearing at 17 (statement of Barbara Prewitt), at 68 (statement of Neill Megaw).

apparently usually deal with these requests in a timely fashion.<sup>187/</sup> Response to a request may be delayed by circumstances outside the publisher's control, e.g., inadequate information in the request, need to acquire permission from an author, or time needed to find out whether the requested material is really the original copyrighted material of the publisher receiving the request.<sup>188/</sup> Publishers insist that delay is usually to the requestor's advantage. A quick "no" answer is always possible; but time consumed in clearing with the author or obtaining a sufficient answer may result in "yes." In any event, they caution, silence does not mean consent.<sup>189/</sup>

Since the passage of the 1976 Copyright Act, permission requests from libraries have increased.<sup>190/</sup>

(i) With payment. It is not clear how many publishers condition permission to copy upon payment of a royalty or fee. One publisher, whose firm has its own unwritten policy, testified that sometimes his firm charged and sometimes it did not. The implication was, however, that charges were made to commercial users.<sup>191/</sup> Another testified that no charge

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<sup>186.</sup> New York Hearing at 127-130 (statement of Weil).

<sup>187.</sup> New York Hearing at 242 (statement of Camille Truschel, McGraw-Hill Book Co). Out of 120 requests/week; 6,000/year, the normal turnaround time is two weeks. Id. at 241. Gerald Summer, Manager of Permissions Dept. at Random House also estimated a two-week turnaround. Id. at 245. Most librarians agree that the turnaround time for most requests is within a comparable time period. See, e.g., Houston Hearing at 17 (statement of Prewitt), See also KRT 2.21 and 4.12.

<sup>188.</sup> New York Hearing at 234-237 (statement of Helen Padgett, Marketing Coordinator of Williams & Wilkins).

<sup>189.</sup> New York Hearing at 235-237.

<sup>190.</sup> Id. at 242 (statement of Camille Truschell).

<sup>191.</sup> New York Hearing at 111 (statement of Allan Wittman).

was made for a "minor use," but a moderate fee was required for "substantial uses."<sup>192/</sup> The American Business Press takes into account the nature of the request, the number of copies involved, and the economic costs.<sup>193/</sup>

(ii) Without payment. As indicated, publishers may charge for substantial or commercial copying. Some librarians have reported that publishers have charged them for permission to copy,<sup>194/</sup> but frequently permission to use the material is granted freely.<sup>195/</sup> Publishers also reported giving permission in many cases without charge.<sup>196/</sup>

b. Broader licensing. Collective systems and individual blanket licenses offer alternatives to individual requests to publisher and/or author.

(i) Copyright Clearance Center (CCC). In 1975 the Senate, in discussing "systematic" copying, urged that "workable clearance and licensing procedures be developed,"<sup>197/</sup> Since 1978, the Copyright Clearance Center, initiated by the AAP and the Authors League at least partly in response to that suggestion, has provided a central source for permissions to copy. The CCC was designed to accommodate librarians who had complained that obtaining permissions required dollars in order to collect

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192. Id. at 245 (statement of Gerald Summer).

193. App. VII at 215-216. See also 1 Washington Hearing at 95 (statement of Leo Albert),

194. See Chicago Hearing at 156. See also App. VII at 7.

195. 1 Washington Hearing at 15 (statement of Elsie Cerrutti); at 44 (statement of Patricia Berger. See also Anaheim Hearing at 105-6 (statement of Sol Grossman) at 77 (statement of James Cox).

196. See 1 Washington Hearing at 95 (statement of Leo Albert); at 58-59 (statement of Sanford Thatcher); 2 Washington Hearing at 106 (statement of Janet Muir).

197. Sen. Rep. No. 473 at 71.

dimes.<sup>198/</sup> The clearance system operated by the CCC permits a registered library to copy any article from a title registered with the CCC and already within the possession of the library. There is no delay: the library makes copies as needed and ultimately remits to the CCC. As of October 1982, the CCC had 5,367 titles registered, 604 participating publishers, and 1,399 users.<sup>199/</sup>

Librarians have given a variety of reasons for not joining the CCC:

1. It does not provide the document wanted.
2. It does not cover an extensive number of titles, and those it does cover are primarily scientific or technical.
3. The record keeping is cumbersome, and they would prefer to go directly to the publisher.
4. It costs money, and the publisher, notwithstanding its CCC participation, might grant permission gratis.
5. The photocopying that they do does not require the payment of fees.
6. The fee does not go to the copyright proprietor.<sup>200/</sup>

The first and last points reflect some misconception about what the CCC is designed to do. It does, indeed, not provide copies; it provides a mechanism for obtaining permissions automatically for copying authorized by neither §107 nor §108, often without regard to where such copying occurs. Copying not authorized by those sections is subject to the control of copyright owners; if they assign their rights to anyone, that assignment must be honored by everyone.

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<sup>198</sup>. Chicago Hearing at 11.

<sup>199</sup>. Letter from David P. Waite, President of Copyright Clearance Center, to Dorothy Schrader, Copyright General Counsel, Dec. 10, 1982, p. 4-5.

<sup>200</sup>. See generally Chicago Hearing at 33, 40, 74, 95-96, 130-131, 154, 173, 178, 197.

Publishers have also been slow to join the CCC. The CCC is attempting to solve all of these problems by educating users and publishers.<sup>201/</sup> David Waite, President of the CCC, observed that the CCC had experienced only moderate growth under the current Transactional Reporting System, but expected more rapid growth under a new system, the Annualized Authorizations Service.<sup>202/</sup>

The Annual Authorizations Service is especially designed to meet the requirements of large organizations who need to internally copy and distribute a significant number of copyrighted material and desire to obtain permission to copy quickly and efficiently.

1. An agreement with publishers which empowers the CCC to act as their agents in authorizing users, to make and distribute copies and collecting fees for this copying and
2. An agreement with users, which sets forth the terms and conditions for the annual CCC authorizations.

The user organization then may make one annual payment to the CCC, to cover all copyrighted publications of participating publishers. The user only records and reports photocopying activity to the CCC for a sampling period.

The new service will not replace but operate in addition to and in conjunction with the transactional service presently operated by the CCC.<sup>203/</sup> The recently settled dispute between several publishers and Squibb<sup>204/</sup> calls for a modified procedure for reporting and payment of fees for copying to the CCC.

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<sup>201.</sup> Id. at 74-78, 87, 95-96 (statement of Charles Lieb).

<sup>202.</sup> Letter, David Waite to Dorothy Schrader, December 10, 1982.

<sup>203.</sup> Id.

<sup>204.</sup> See, text infra, II.

(ii) Blanket licenses. The concept of a voluntary single payment blanket license has advantages. King asked publishers how many "blanket agreements" or "blanket licenses" they had whereby organizations could copy any item whose copyright that publisher controlled without making an individual request every time. The survey only revealed an average of 1.1 such agreements per publisher.<sup>205/</sup>

The CCC is now establishing a blanket license for large organizations with the Annualized Authorization System discussed above. Such arrangements will probably find acceptance in corporate libraries rather than in academic libraries.

(iii) Amplified notice, e.g., Law Review Compact. Members of the American Association of Law Schools (AALS) have adopted a policy that permits non-profit copying of articles appearing in the law reviews of AALS member institutions, for educational purposes.<sup>206/</sup> On March 20, 1978, the AALS recommended that member schools approve copyright clearance for educational photocopying. In so doing, they also suggested two ways in which notice of this permission for copying could be given in the law journal.<sup>207/</sup> Later, AALS suggested a third way to indicate copying permission and asked how many law schools had complied.<sup>208/</sup> Of the AALS members, about 100 law schools<sup>209/</sup> now contain information in the masthead of the law journal that

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205. KRT 4.13 at 4.31.

206. App. VII at 69.

207. AALS Memo, March 20, 1978.

208. AALS Memo, May 23, 1978.

209. Conversation with James Heller, Chairman, American Association Law Library Copyright Committee.

permits copying for educational purposes.<sup>210/</sup> Permission of this kind may spread to other types of journals. Some authors are including such a notice on their work.<sup>211/</sup>

2. For copies prepared elsewhere.

a. Past experience

(i) NTIS/JACS. In 1977-1978, the Department of Commerce's National Technical Information Service (NTIS) operated the Journal Article Copy Service (JACS). Its users were willing to pay royalties, but did not want lengthy delays. JACS was a centralized automated order transfer and accounting system linked to existing document delivery services of libraries and information brokers.

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210. See, e.g., Journal of Legal Education, Cornell Law School:

Except as otherwise expressly indicated, the author of each article in this issue of the Journal has granted permission for copies to be made for classroom use in a nationally accredited law school so long as (1) copies are distributed at or below cost, (2) author and Journal are identified, and (3) proper notice of copyright is affixed.

The Yale Law Journal:

Except as otherwise provided, the author of each article in this issue has granted permission for copies of that article to be made for classroom use, provided that (1) copies are distributed at or below cost, (2) author and journal are identified, (3) proper notice of copyright is affixed to each copy, and (4) the user notifies the Yale Law Journal that he or she has made such copies.

Georgetown Law Journal:

For all articles in which it holds copyright, the Georgetown Law Journal grants permission for copies of that article to be made and used by nonprofit educational institutions, provided that the author and the Georgetown Law Journal are identified and that proper notice of copyright is affixed to each copy. Except when otherwise expressly provided, the copyright holder for every article in this issue for which the Georgetown Law Journal does not hold copyright grants permission for copies of that article to be made and used by nonprofit educational institutions, provided that the author and the Georgetown Law Journal are identified and that proper notice of copyright is affixed to each copy.

211. See, e.g., Treece, Library Photocopying, 24 UCLA L. REV. 1025 (1977).



By the end of 1978 JACS covered 5,000 journal titles from about 500 publishers and used about 17 fulfillment services (libraries, information brokers, publishers). It had about 1,000 customers and handled up to 100 orders per day. JACS accepted orders in electronic form from NTIS customers and relayed these orders to a fulfillment service for pulling, copying, and mailing to the customer the next business day. Ninety-five percent of the orders accepted were filled, and the typical order was filled four days after it was requested.<sup>212/</sup>

The program was disbanded in 1979 for political and budgetary reasons. But, as the former Deputy Director of NTIS responsible for JACS observed, "...the two-year experimental operation of the system clearly demonstrates the feasibility of an automated, decentralized article delivery system with a royalty payment mechanism as an integral part of the system design."<sup>213/</sup>

b. Present experience

(i) ISI. Today the Institute of Scientific Information (ISI) is one of more than 50 organizations that provides document delivery service for a fee. ISI's Original Article Tear Sheet Service (OATS) was designed to supply full-text copies of articles that are not readily available from more traditional channels such as libraries or reprints from authors. Originally, the service was offered only to ISI customers, and they still get a preferred rate.

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<sup>212</sup>. New York Hearing at 5-41 (statement of Peter Urbach).

<sup>213</sup>. Id. at 8.

In 1977 Dr. Eugene Garfield, President and Chairman of the Board of ISI, reported that ISI processed over 5,000 journals representing all physical and social sciences. He noted that more than 500,000 articles a year, about 100 articles per journal, were processed and indexed and that he expected to fill more than 110,000 OATS orders in 1977. He also estimated that only 12% of the requests represent more than one request for the same article and that ISI pays royalties to all publishers who want them.<sup>214</sup>/

In 1981, ISI processed over 6,000 journals, indexed over 825,000 articles and filled over 150,000 orders. ISI usually receives no more than one or two requests per article requested. The average turnaround time is 48 hours. ISI charges \$6.75 for an article of 20 pages or less, and most requested articles are within that range.<sup>215</sup>/

Of the journals indexed, approximately 30% are made available through OATS under direct contractual agreement between ISI and the specific publishers. Approximately 5% of the journals available through OATS are accessed through the agreement established between the CCC and the member publishers (copyright authorization is between the CCC and the publishers and not between ISI and the publishers in this instance). The balance of journals covered through OATS are those in the public domain, or those for which the publisher has not responded to ISI or CCC requests for royalty agreements.<sup>216</sup>/

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<sup>214</sup>. CONTU Transcript No. 17, at 71-98, Oct. 21, 1977 (statement of Dr. Eugene Garfield).

<sup>215</sup>. Telephone Conversation Karen A. Gniewoz, December 28, 1982.

<sup>216</sup>. Id.

(ii) University Microfilms International (UMI). University Microfilms International, formerly known as Xerox University Microfilms, is another major organization that provides documents for a fee. The company, located near the campus of the University of Michigan in Ann Arbor, is a part of the Xerox Publishing Division. UMI is a publisher on demand of serigraphs, documentations, or any of its other extensive holdings. UMI provides its customers with an exhaustive catalog not only listing all titles available — over seven hundred and sixty pages in the 1982-1983 catalog -- but also explains how to order material.<sup>217</sup>/ Libraries, including the Library of Congress, are the main customers.

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<sup>217</sup>. See generally, CONTU Transcript No. 16, at 70, September 15, 1977 (statement of Stevens Rice).



## CHAPTER V. KING REPORT

A. Introduction.

The question whether section 108 has achieved the desired statutory balance can not be answered simply by examining its provisions and the opinions of the persons affected by them. To be sure, the textual provisions and the views of the parties do provide an observer with an understanding of what the law is perceived to mean; but the existence of a balance ultimately depends on how people behave when their conduct falls within the law's ambit. The Copyright Office employed two different methods to learn the nature of present practices concerning library photocopying.

First, as set out in the law, the representatives of authors, publishers, libraries, and their users were consulted. The initial steps in this consultation took the form of the appointment, by the Register, of an Advisory Committee of ten persons whose breadth of experience and expertise made them likely if not obvious choices to serve on any group whose task was to consider issues concerning library photocopying.<sup>1/</sup> After several meetings with the Advisory Committee, the two information-gathering methods were selected: (1) a series of hearings were held throughout the country at which persons affected by or interested in §108 presented their views (either at the hearings or in writing); and (2) several statistical surveys -- of publishers, libraries, and their patrons -- were carried out.

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1. A list of the members of the Advisory Committee is set out at page A-3 of the King Report.

The purpose of the surveys was to obtain, where it might be available, some objective evidence concerning the issues about which dozens of witnesses and respondents expressed their opinions and beliefs. With the help of the Advisory Committee, bids were solicited so that a contract could be let to perform the work. King Research, Inc., of Rockville, Maryland, was selected as a result of the bidding. The surveys were conducted, for the most part, during calendar 1981, and the King Report (hereinafter "KR") was submitted to the Copyright Office in May, 1982. Additional data were requested and received in July and December. This chapter of the Copyright Office report deals with the results of the surveys conducted by King. The KR itself is Appendix I of this report.

Before turning to the specific findings found in the KR, it may be useful to state briefly the contents of the remainder of this chapter. The next section describes the scope of the various surveys, the levels of cooperation by the surveyed populations, and the accuracy of the findings. It is designed to give the reader some understanding of what King set out to accomplish and the extent to which those goals were achieved.

Following the survey descriptions is the section which sets out the facts as found by King and their relationship to the issues discussed throughout this report. In that section, the views expressed by interested parties concerning the validity, relevance, and meaning of the King data are, of course, considered. As can be seen from the record, and in this report, the parties to the various disputes arising under the provisions of §108 do not universally accept all of King's "facts" as authoritative. This is, of course, particularly true when the evidence adduced in the KR runs contrary to the beliefs or positions of the parties. The questionnaires and methods employed by King are part of the record upon which this report

is based. The Copyright Office is confident that the surveys were performed in the manner most likely to yield useful results and that any shortcomings in the data result from a variety of factors: the disappointing lack of cooperation on the part of two classes of surveyees; the difficulties inherent in reaching agreement among diverse interests; whether and how certain issues should be raised and questions asked; and, the ever-present constraints of time and money. As good and useful as King's work is, it could perhaps be done better if all concerned, with the benefits of their recent experience, were to engage in their work now rather than in 1981. Accepting, however, that foresight is never 20/20, the Copyright Office is satisfied that the KR contains a wealth of information which is very useful in determining whether the desired balance between creators and users exists.

B. The Surveys.

The implicit purpose of all of the surveys conducted by King was to attempt to quantify the behavior of people whose activities in some way concern or are affected by library photocopying. The obvious reason for this was to learn how people's behavior and experiences comport with the statements and beliefs of their representatives. This is not necessarily a criticism of the representatives; indeed, on many occasions, the common wisdom or traditional position was borne out by the evidence. At times, however, the information contained in the KR seemed at odds with the expectations of some or all of the persons who were involved with the creation of the record or the preparation of this report. On some occasions, moreover, the existence of a balance, and the desirability or necessity of a change in the law, appeared to rest, at least in part, on the credibility

of the data or their interpretation. In these respects, the Congress may wish to examine very carefully the positions that the parties will likely express to it.

1. Authors.

As was the case in the hearings,<sup>2/</sup> no method for obtaining information directly from the authors of works which are often photocopied, or who had other relevant photocopy-related experience, seemed available to the Advisory Committee, the Copyright Office, or King Research. Thus, there was no survey of authors, as such. It is, however, largely true that publishers, particularly those of the kinds of works whose photocopying is especially popular and believed to be of serious consequence, may serve as valid proxies for their authors with respect to the issue of photocopying.

Although this seems clear to the Copyright Office, some library organizations apparently disagree, on the grounds that publishers are not among the "creators" to whom section 108(i) directs the focus of this report; and, that many authors of scholarly articles are interested only in the widest possible dissemination of their works, without regard to such traditional copyright considerations as royalty revenues and control over public distribution. Whatever the merits of these contentions, they are not particularly relevant to the question whether, with respect to photocopying issues, the interests of authors and publishers are common enough that the latter may serve as valid proxies for the former.

Whatever the positions taken by the persons who initially write text for publication, the Copyright Office is aware of no circumstances in which a publisher undertakes to print and distribute such works without

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2. See text supra, IV C(2).



first obtaining substantial copyright rights in the work, either by conveyance, license, or the "work-made-for-hire" provisions of the law.<sup>3/</sup> Thus, the authors' interests may be reasonably seen to be consolidated in the publishers of the works whose photocopying gave rise both to section 108 and the need for this report.

## 2. Users.

At the other end of the photocopying spectrum from authors are library patrons or, as they are known here, users. Unlike authors, they proved readily identifiable and surveyable. Two different groups of patrons were the subjects of slightly different surveys.<sup>4/</sup> The first survey was directed essentially to all persons entering certain libraries. They were asked questions about photocopies of library materials which they had made or obtained in the previous six months. The second survey was of those patrons who were actively using photocopying machines in the same libraries. They were asked questions about the photocopying they were then doing.

The goal of the Copyright Office was to obtain the results of 1250 interviews of patrons from 25 libraries. Ideally, the libraries were to be evenly divided among the five types of libraries to which the "library" portions of the KR were directed: academic, public, federal, and special libraries, with the last class divided as between those special libraries located in for-profit entities (SFP libraries) and those in not-for-profit organizations (SNP libraries). King contacted 65 libraries

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<sup>3</sup>. 17 U.S.C. §§ 101 (definition of "work-made-for-hire") and 201(b) (1980).

<sup>4</sup>. The user questionnaires are found at Appendix D of the KR.

but could find only 19 which both had user-operated photocopy machines and were willing to permit King employees to conduct surveys of their patrons. These included five public and SNP libraries, four academic and federal libraries, but only one SFP library. In order to get more data from patrons of SFP libraries, King then added to its list two such libraries which were willing to let their patrons be interviewed but which did not have "floor machines." The Copyright Office was disappointed that here, as in the hearing process, SFP libraries declined to participate at the same level as all other types of libraries. Since the parties are sharply divided about the applicability of some or all of §108 to such libraries, the debate which will likely follow this report could have been substantially better informed had more SFP libraries chosen to share their information with the public.

Notwithstanding the reservations of some librarians, the goal of 1250 interviews was exceeded: all told there were 1980 questionnaires completed, with the "per-type" goal of 250 being substantially met or exceeded in all library types save SFP. Even there, with only three libraries ultimately participating, 63% of the desired interviews were conducted. As far as the Copyright Office can determine, these surveys mark the first successful effort to quantify the photocopying behavior of library patrons on a broad basis in several types of libraries. Most previous surveys dealt either exclusively with libraries or with so few users as to be far less significant.

Although the interviewers in these surveys asked their questions of different pools of users, the questions asked of the two groups were substantially the same and, significantly, so were the answers given by the users. Given the size of the pools — 1157 "entrants" and 823 "copiers" --

and the strong similarity of their answers, it is reasonable to conclude that the data derived from these users represent, at a minimum, a fair approximation of the behavior of user populations in the surveyed libraries. At the same time, since only 21 libraries were the sites of the user surveys, it is not clear how confident one can be in attempting to extrapolate from these data across the national population of library patrons.

### 3. Libraries.

#### a. Phase One.

The various library surveys were the focus of much of the attention paid to the KR by the parties. This is understandable since the "library" portions, chapters two and three, comprise the bulk of the report. Phase One of the surveys consisted of sending questionnaires<sup>5/</sup> to enough randomly-sampled libraries to obtain a total of 500 answers from the five types of "target" libraries: public, academic, federal, SFP, and SNP. For a variety of reasons,<sup>6/</sup> data were not sought from "school libraries" i.e., those located in elementary and secondary schools.

Overall, some 70% of the libraries receiving questionnaires (554 of 790) filled them out and returned them. This cooperation ratio was met or bettered in all types of libraries except "specials" where, it appears, the reluctance of SFP libraries brought the overall cooperation rate for "specials" down to 58%.<sup>7/</sup> King's goal was to obtain 100 responses from

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5. The Phase One Questionnaire is set out in Appendix A to the KR.

6. The Advisory Committee and the Copyright Office concluded that, given budget constraints, there was less to be learned from school libraries than from the "target" types.

7. King Report Table (KRT) 2.1.

each type of special library. Because an a priori division between SFP and SNP libraries was frequently impossible, such libraries often classified themselves in their responses.

Ultimately, some 37.4% of the "special" respondents proved to be SFP libraries. While this could reflect either the actual ratio of SFP's to all special libraries, or the reluctance of SFP's to cooperate with the survey, or both, the Copyright Office is inclined to credit, to a degree, the second hypothesis, given SFP libraries' clear reluctance to participate fully in the hearings and the user survey.<sup>8/</sup>

Overall, questionnaires were received from enough libraries to justify some confidence that the data contained in chapter two of the KR, based on Phase One of the surveys, fairly reflect library photocopying behavior in general.

b. Phase Two.

The last question asked of libraries in the Phase One questionnaire was whether they were willing to make additional efforts to provide further data for the survey. Volunteering libraries were asked to keep detailed logs of staff photocopying and interlibrary "loan" (ILL) transactions. Of the 554 libraries which took part in Phase One, 149 volunteered to keep ILL logs and 150 agreed to keep photocopying transaction logs. This excellent level of cooperation led ultimately to the receipt by King of detailed records of 7,651 ILL requests and 15,863 staff photocopying transactions.

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8. See text in the "User" section, supra. SFP participation rates in Phase Two of the Library Survey (see infra) is perhaps less significant because only volunteers from among Phase One participants were used.

The general reliability of the data derived therefrom, and contained in chapter three of the KR, may be seen in King Report Table (KRT) 1.1 and 1.2, where one may calculate, for example, that there is a 90% probability that the number of photocopies made from serials in 1981 by public library staff members, nationwide, was between 10.8 and 12.8 million.<sup>9/</sup> (This is the number of complete copies, not the number of impressions (i.e., pages)). This level of confidence permits one to say that the data in chapter three of the KR reflect a reasonable, if concededly imperfect, view of reality.

#### 4. Publishers.

Initially, proprietary and library members of the Advisory Committee held different views as to the scope of any survey of publishers. Librarians argued that the word "balance," to which this whole report is directed, virtually required an examination of publishers' policies, practices, and revenues if the effort were to be complete and fair. Publishers, on the other hand, were not keen on being surveyed at all and were vigorously opposed to being required to disclose any confidential financial data. This opposition had two largely unrelated bases: a desire not to disclose confidential business information and the belief that economic harm is irrelevant to copyright policy for photocopying.

For a variety of reasons, the publishers survey was nonetheless carried out. Library members of the Advisory Committee made clear the

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<sup>9.</sup> This range is based upon the estimate of 11.8 million plus or minus the quantity 1.64 times the standard error (which in this case is 591,000). To increase one's confidence from 90% to 95%, one multiplies the standard error by 1.96, here yielding a range of 10.6 to 13.0 million copies.

strength of their feelings that a publisher survey was completely necessary, both for the information it would yield and to persuade libraries that their participation was part of an even-handed survey, whose burdens were spread across all sectors of the photocopying-interested community. In addition, great pains were taken to ensure the confidentiality of the data gathered in all the surveys. Neither competitors, adversaries, the Copyright Office, the Library of Congress, Advisory Committee members, nor the public will ever have access to completed questionnaires nor to any other item by which an individual respondent's data can be attributed to him. The data appear in the KR only in the aggregate and all forms from which a respondent could be identified were destroyed after having been tabulated. Finally, although it is important to remember that economic harm is not an element of an action for copyright infringement, the effects of photocopying behavior -- including the transfer (or nontransfer) of monies related to photocopying -- are central to certain contentions about what constitutes a balance.

The Copyright Office wanted to obtain data from at least 450 publishers, divided into three classes: publishers of books, publishers of scholarly, scientific, or technical (SST) journals, and publishers of all other serials.<sup>10/</sup> To that end, King took the extraordinary step of calling a randomly-selected sample of 969 publishers to ask them to fill out the questionnaire.<sup>11/</sup> From the 556 publishers who initially agreed to cooperate, a list of 450, evenly divided among the three types, was chosen and questionnaires were sent to them.

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<sup>10.</sup> Definitions of each of these types of publisher may be found at pages 4-3 & 4-4 of the KR.

<sup>11.</sup> The publisher questionnaire appears as Appendix C of the KR.

Notwithstanding the preliminary telephone calls, their prior agreement, a letter of explanation from the Copyright Office which accompanied the questionnaires, and various follow-up techniques employed by King, only 51% (231 of 450) of the publishers returned usable questionnaires. Although this level of response was disappointing, the reasons sometimes given -- both for not initially agreeing and for not completing the questionnaire after having agreed to do so -- include the interesting comments (on several occasions) that the publisher was not concerned with copyright, photocopying, or both.

The publisher data may not therefore be as random as one would like, as they may disproportionately come from those publishers most concerned with photocopying. Nonetheless, they are interesting; and, as KRT 1.3 permits one to calculate, they are satisfactorily precise. For example, one may be 90% confident that the mean revenue of SST journal publishers in 1980 was between \$576,700 and \$627,300.<sup>12/</sup>

### C. King's Findings and Their Meaning.

#### 1. KR Chapter One. Introduction and Summary.

Apart from the brief descriptions of the surveys and the "statistical precision" tables, which appear on pages 1-1 through 1-4 and 1-14 through 1-16 of the KR, respectively, chapter one has not been used by the Copyright Office in the preparation of this report. We recommend against placing much weight upon King's section 1.2.2 ("Summary of Findings") because it represents the selection and presentation of data believed significant by the contractor rather than by the Copyright Office. Our

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<sup>12.</sup> This is calculated by taking the estimate of the mean (\$602,000) and alternately adding and subtracting 1.64 times the standard error (\$15,400).

preference would have been for King to describe the survey work done, estimate its statistical (but not legal) significance, and then turn directly to its excellent presentation of data in chapters two through five. Perhaps our preference has been strengthened by experience: public misimpressions were created when the American Library Association decided to distribute King's "Summary of Findings" to its members and other requestors, all of whom were understandably eager to see what the King survey had found. ALA acted in good faith, but the "Summary" should not be used to represent the conclusions of the Copyright Office.

This may seem petty, but it should be clear that the choice of data to include in a brief summary and how they are characterized, goes a long way toward predisposing casual readers to a conclusion about the question of balance. That question was directed by the Congress to the Copyright Office and was, most emphatically, delegated neither to King nor to the Advisory Committee. While we do not believe that King meant to exceed the scope we intended, its selection of certain data for inclusion in its summary, necessarily gives emphasis to those data, and may color the perception of the hurried reader. We therefore commend -- to Congress and all other interested readers -- chapters two through five of the KR and urge all readers to make their own copyright evaluations. We state ours throughout this report.

## 2. KR Chapters Two, Three, and Five. Surveys of Libraries and Their Patrons.

### a. Library Practices in General.

As may be seen in King Report Table (KRT) 2.3, nearly two-thirds of all libraries (but barely more than one-third of SFP libraries) belong to ILL networks where, according to the questionnaire,



one of the features of membership is the provision of special interlibrary borrowing procedures, e.g., reduced rates for interlibrary loan, automated transmission of requests, delivery service, etc.<sup>13/</sup>

As discussed previously in this report,<sup>14/</sup> ILL photocopying is "systematic," and only permitted to the extent set out in the proviso to subsection (g)(2).

KRT 2.3 also shows that a significant (but much smaller) proportion of libraries are involved in coordinated collection development.<sup>15/</sup> According to the questionnaire, this term covers

[the] identification of libraries with subject specialties, coordinated serial retention policies, elimination of subscription overlap, etc.<sup>16/</sup>

This group of practices appears dangerously close to those described by the Senate as being prohibited by subsection (g):

... (3) Several branches of a library agree that one branch will subscribe to particular journals in lieu of each branch purchasing its own subscriptions, and the subscribing branch will reproduce copies of articles from the publication for users of the other branches.<sup>17/</sup>

The Copyright Office does not believe that the proviso, whose thrust is toward conventional ILL transactions, should be interpreted to permit, without the permission of copyright owners, the activities to which the Senate objected and which may be occurring to some extent in the 21.7% of libraries which engage in coordinated collection development.

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13. KR at A-8.

14. See, text supra, IV A(4)(a) and (c).

15. Generally between 20 and 30% but only 10.7% of SFP libraries.

16. KR at A-9.

17. Sen. Rep. 473 at 70.

The final columns in KRT 2.3 reflect the extent to which libraries are involved with photocopying. In 70.3% of all libraries there is at least one photocopy machine. Furthermore, as is shown in KRT 2.13, of those libraries least likely to have machines on the premises (SNP (40.8%) and SFP (50.2%)), fully 82.6% of them (73.4% of the SNP and 94.1% of the SFP) have machines "within walking distance."<sup>18/</sup>

Personnel as well as machines contribute to photocopying activities. In roughly two-thirds of all libraries, staff members make or obtain photocopies for patrons at least once a week.<sup>19/</sup> Indeed, as KRT 2.12 shows, more than half of all libraries (and 67.1% of all non-public libraries) operate a "photocopy service," which is defined in the questionnaire as meaning that:

at least once per week, photocopies of library materials are made by or for your library's staff in response to library users' requests.<sup>20/</sup>

Photocopying behavior is not necessarily uniform among all types of libraries. As seen in KRT 2.4, academic libraries, which comprise 15.3% of all libraries, make up 31.1% of "level one" libraries — those which have staff members permanently assigned to make photocopies for patrons. In total, 17.5% of all libraries are "level ones," but 35% of "academics" and 24.3% of SFP's have that status. While the law does not explicitly

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18. "Walking distance" means "down the hall, on another floor, within a building close by." KR at A-11.

19. KRT 2.3.

20. KR at A-11.

address such employment patterns, it is arguable that the permanent assignment of staff members to make photocopies for patrons makes the photocopying done by those employees look rather systematic.<sup>21/</sup> At all events, the data make it clear that some libraries do enough photocopying for their patrons that they have incorporated it into the regular tasks they assign their employees.

As one might reasonably expect, level one libraries are more likely than others to engage in systems and practices related to large-scale photocopying. KRT 2.5 shows that 80.2% of level one libraries belong to ILL networks (as against 64.3% of all libraries); that 35.7% belong to collection development consortia (as against 21.7% of all libraries); and that 15.7% belong to the Copyright Clearance Center, Inc., as compared with less than four percent of non-level one libraries.

b. Library Expenditures.

Among the concerns expressed by publishers with respect to photocopying is the fear that libraries, through coordinated collection development and ILL activities, are meeting budget constraints at the expense (and in violation of the rights) of publishers, particularly of serials. Perhaps this is occurring; but its effect on library expenditures would have to be in reduced real growth rather than reductions in total purchase and subscription expenditures. After allowing for inflation, there was, between 1976 and 1980, a seven percent increase in book expenditures and a

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<sup>21</sup>. See e.g., Encyclopaedia Britannica v. Crooks, 542 F.Supp. 1156 (W.D.N.Y. 1982), where the court noted that an institutionalized off-air taping system (for educational use) with nine employees was conducting "massive videotape copying" and, thereby, committing copyright infringement. At 1169.

twelve percent increase in serial expenditures among all libraries.<sup>22/</sup> The only reduction in real expenditures occurred among public libraries with respect to serials, and that was one percent.

It thus appears that in a time of severe budgetary difficulties most libraries managed to increase their acquisitions expenditures at a rate greater than inflation. The corners that may have been cut elsewhere do not show up in the data, but phenomena such as dramatically reduced public library hours are so well documented<sup>23/</sup> it is clear, as librarians state,<sup>24/</sup> that acquisitions budgets are spared as long as money can prudently be saved elsewhere.

c. Photocopy Machine Populations.

Between 1976 and 1980 the overall number of photocopy machines per library was also growing, from 4.5 to 6.0, an increase of 33%.<sup>25/</sup> The percentage of such machines which are coin-operated (and therefore probably used almost exclusively by patrons) has remained virtually steady at 70% over the same time. This casts doubt on the assertion that librarians, "unwilling" to assume the burdens of copyright responsibility, have consciously increased the proportion of coin-operated machines in their libraries

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22. KRT 2.7.

23. See Cayton, Daring to Be Different: The Denver Public Library, 56 Wilson Library Bull. 504 (1982); Bourne, Surviving the Present: San Francisco Public Library, 55 Wilson Library Bull. 736 (1981).

24. See, e.g., Anaheim Hearing at 61, 86 (statement of Norman Dudley); New York Hearing at 78 (statement of Robert Wedgeworth), 87 (statement of Nancy Marshall), and 309 (statement of Laura Gasaway). But see, 1 Washington Hearing at 140 (statement of Maureen Seaman).

25. KRT 2.9. Expansion was largest in academic and federal libraries (70% each), 30% in SFP libraries, and 28% and 23% in public and SNP libraries, respectively.

in order to shift the burden of copyright compliance to their patrons and insulate themselves from liability by compliance with the formalistic, but simple, requirements of §108(f)(1). If such burden-shifting has been attempted, it is not seen in the data concerning coin-operated machines.

Part of the compromise inherent in §108 is the notion that by placing a warning regarding copyright in certain places a library may lawfully copy some or all of a work for a patron<sup>26/</sup> or can immunize itself from liability for the unsupervised infringements of its photocopying patrons.<sup>27/</sup>

The data in KRT 2.10 suggest that, at least in the latter area, compliance has been excellent, with librarians reporting that a warning is present on 92.9% of their coin-operated machines (where unsupervised copying is most likely to occur). From the data in KRT 2.8 and 2.10 one may calculate, however, that fully 30.4% of non-coin-operated machines (approximately 10,000 machines) bear no warning. While this is not a problem if no unsupervised copying takes place on such machines, data from the user survey suggests that more than 15% of unsupervised patron copying takes place on machines without warnings.<sup>28/</sup> Libraries run a risk of vicarious or contributory liability for the copying in excess of fair use which their users do on machines which bear no warnings.<sup>29/</sup>

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26. Section 108(d)(2) & (e)(2).

27. Section 108(f)(1).

28. KRT 5.21 shows that there were warnings on 83.4% of the machines on which users were making copies of library materials.

29. See, text supra, IV A(5).

d. Impressions.

After discussing library practices and machine populations, the KR turns briefly to some very interesting statistics on photocopying impressions.<sup>30/</sup> The first item of interest in section 2.3.3 of the KR is the disparate distribution of responding libraries which chose not to report the number of impressions made on their machines. The non-response ratios ranged from a low of 39% (Academic) to a high of 71% among SFP libraries. This latter reluctance continued the pattern of non-disclosure by SFP libraries previously noted with respect to the hearings, the user survey, and suggested in the level of responses to Phase One of the library survey.

The impression statistics which were reported in the KR suggest that coin-operated machines are used much more heavily than other machines in public and academic libraries. In public libraries, "coin-ops" comprised 78% of all machines but were the site of 99% of the impressions made. In academic libraries, where 70% of the machines were coin-operated, 87% of the impressions were made on them.<sup>31/</sup> In other library types, there were relatively few of such machines and the "coin-op" statistics were not calculated separately.

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30. An "impression" is one page of photocopying. Most of this report, like the KR, speaks in terms of numbers of copies rather than impressions.

31. KRT 2.8 and 2.11.

Perhaps the most interesting "impressions" statistic is one not found in any table: during 1980 a total of 4.97 billion impressions were made on photocopy machines in libraries.<sup>32/</sup> The mammoth volume of library photocopying which this reveals can be put in terms more accessible to most people than "billions" by considering that a single stack of 4.97 billion pages of ordinary photocopy paper would be more than 300 miles high.<sup>33/</sup> To be sure, not all of the materials from which these impressions were made were in copyright, and a very small portion of such copying was authorized explicitly by proprietors<sup>34/</sup> but, all in all, the volume of production shows, if nothing else, why proprietors are concerned about library photocopying.

e. Restrictions on Photocopying.

Of those libraries which do enough photocopying to qualify as level one or two libraries,<sup>35/</sup> fully 70% charge their patrons for photocopying done by the patrons, for the patrons, or both.<sup>36/</sup> Indeed, if one ignores those libraries whose patrons are likely to be paid by the same sources which fund the libraries (federal and SFP libraries), the incidence of fee imposition increases to 86%. Notwithstanding the strong library

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32. This datum is obtained by multiplying the mean of 272,700 impressions per library (KRT 2.11) by the number of level one and level two libraries (18,224).

33. At 2"/ream (500 sheets), the stack would be 313 miles high.

34. KRT 3.11 shows that librarians state that they obtain permission to make photocopies (with or without payment) in 1.1% of all transactions.

35. A "level two" library is one which does not permanently assign staff to make photocopies, but either has a photocopy machine, makes photocopies of library materials at least once a week for patrons, or both.

36. KRT 2.14.

tradition of providing services on a price-free basis to users, the expense of obtaining and using photocopy machines is one which most libraries have chosen to pass, in whole or in part, to those users.

In addition to requiring users to pay for the photocopies they obtain, libraries often restrict photocopying in non-monetary ways. Limiting criteria such as length of copies, number of copies to be made, types of materials to be copied, and the copyright status of such materials are applied with various frequencies.<sup>37/</sup> This said, none of these restrictions is applied by even half of all libraries. Apart from federal libraries, the only restrictions made by more than 50% of any given library type are quantitative (by 61.5% of SNP libraries) and copyright (by 52.8% of academic libraries). Tables 2.14 and 2.15, taken together, show that the most common library restriction on the ability of a patron to make or obtain photocopies is price, and that for patrons willing to pay the price imposed by libraries, other restrictions occur, in the aggregate, less than half the time.

f. Reserve Collection Practices.

The practice of keeping photocopies on reserve in a library occurs in most academic libraries, but in only 6.6% of all other libraries.<sup>38/</sup> Of those academic libraries which maintain reserve operations, 68%

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37. KRT 2.15.

38. KRT 2.16. (The 6.6% figure for "all others" is found by removing the 2884 (of 3173) academic libraries which have reserve operations from the totals).



report that the Copyright Act of 1976 has affected their policies or procedures.<sup>39/</sup> The most common effect apparently has been to require faculty members to vouch for the non-infringing status of photocopies which are placed on reserve.

g. Interlibrary Arrangements.

Much attention has been paid — by the parties, the National Commission on New Technological Uses of Copyrighted Works (CONTU), and the Congress -- to photocopying in lieu of interlibrary loan. This report avoids the use of the commonplace "interlibrary loan" in describing such behavior since, of course, there is no lending involved when a photocopy is sold or given by one library to another. The initialism "ILL" is used here (and in the KR) to refer to all interlibrary transactions involving the transfer of copies of works, including the "old-fashioned" lending of originals and the permanent transfer of photocopies.

KRT 2.17 and 2.19 reveal the extent to which libraries of all types engage in ILL activity. The former shows that slightly over 90% of all level one and two libraries sought copies of materials from other libraries during 1980. Nearly one-fifth (18.2%) of those libraries refused on at least one occasion to transmit a request to another library

on the grounds that these requests would violate applicable copyright laws or copyright guidelines.<sup>40/</sup>

The user data reveal how infrequently these refusals actually occur. KRT 5.18 shows that of the 224 "entrant" patron reports of the results of their ILL requests, 5.3% (12 reports) were of refusals. According to King,

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<sup>39</sup>. See KR at A-14 (Question 30) for the question.

<sup>40</sup>. Library Questionnaire, KR at A-17.

no one cited copyright as the reason for refusal. Most of the [users] merely stated that the item [requested] was not available.<sup>41/</sup>

Similar information with respect to "copiers" is found in KRT 5.21. There one learns that virtually one-quarter of such patrons had made an ILL request (i.e., had asked a library to obtain materials for them from the collections of another library), including fully half of the SFP patrons. Of these patrons' requests,

6.3 percent of [them] were refused.... Only two patrons cited copyright as the reason their request was refused.<sup>42/</sup>

Although the discussions concerning ILL issues often center on small libraries as net "borrowers" and large institutions as net "lenders," the data in KRT 2.19 show that almost as many libraries receive ILL requests for copies of works in their collections as make requests to other libraries (84.7% as against 91.2%). Nearly as many "requestees" refused, on copyright grounds, to fill one or more requests (16.4%) as had refused, also for copyright reasons, to transmit a patron's request (18.2%). This is interesting inasmuch as requesting libraries bear most of the copyright compliance burden in ILL transactions.<sup>43/</sup> In general, as long as requesting libraries certify to a supplying library that their request conforms with the law (generally because it does not, by virtue of its relation to previous requests, amount to a substitution for subscription to or purchase of the work requested), the supplying library need not take further steps to investigate the circumstances behind the request. That the proportion of libraries which refused to fill ILL requests is nearly the same as the

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41. KR at 5-25.

42. KR at 5-31.

43. See, text supra, IV (A)(4).

proportion which refused to transmit requests from its patrons may reflect careful copyright compliance on the part of some potential supplying libraries or confusion about the law at either or both ends of the ILL spectrum. Requesting libraries who fail to certify compliance in their requests should have such requests refused; supplying libraries who do not fully understand the level of copyright immunity granted them may be refusing to fill requests which they might lawfully fill.

Three hypotheses may be offered to account for the low rates of "refusals" of patron requests, but none can be conclusively accepted or rejected on the basis of the information at hand. Either requesting libraries do, as they have often insisted, purchase or subscribe to frequently-demanded works (thus meaning that patrons' requests need rarely be refused on cumulative quantity grounds); or the so-called "rule of five" from the CONTU guidelines is being ignored, and libraries are requesting and receiving copies in excess of Congress' intended quantities; or, upon exceeding the five-copy rule, libraries are asking/paying for permission in such a routine way that their patrons rarely suffer the inconvenience of a refusal. The parties disagree about which hypothesis most accurately reflects reality, and the King Report, although it does suggest that some unauthorized ILL photocopying is occurring,<sup>44/</sup> does not settle this factual dispute.

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<sup>44</sup>. Data from KRT 3.10, 3.11, and 3.12 show that in 5.3 million ILL photocopy transactions, a total of 17.0 million copies were made, which calls into question the extent to which the rule of one copy at a time is being followed.

Somewhere between 20% and 30% of all ILL requests (including those which are not filled) appear to be filled with photocopies. Supplying libraries report filling 20.9% of all requests with photocopies,<sup>45/</sup> while requesting libraries report that 28.0% of their requests (and 40.0% of their filled requests) resulted in the receipt of a photocopy.<sup>46/</sup>

The mix of ILL receipts, as between originals and photocopies, was markedly different with respect to public and all other libraries. 86.5% of public libraries' ILL receipts were originals,<sup>47/</sup> whereas 67.6% of all other libraries' ILL receipts were photocopies.<sup>48/</sup>

Patron experiences are less easy to comprehend directly from the text and tables in the KR. In the interest of clarity, the Copyright Office has reformatted KRT 5.18 and 5.23 as follows:

Table 5.18(a)  
"Entrants" ILL Request Results

(Frequency with which patrons stated certain results from their ILL requests for the preceding six months)

Result	Number of Responses	One Time	More than One Time	Total
Filled--Original		61	63	124
Filled--Photocopy		32	56	88
Refused		9	3	12

45. KRT 2.20. (12,737,000 photocopies for 60,890,000 requests).

46. KRT 3.3(a) & (b). (6,961,000 photocopies out of 17,302,000 ILL receipts).

47. Ibid. 7,559,000 originals out of 8,735,000 receipts.

48. Ibid. 5,785,000 photocopies out of 8,553,000 receipts.

Table 5.23(a)  
 "Copiers" ILL Request Results

(Frequency with which patrons stated certain results from their ILL requests for the preceding six months)

Result	Number of Responses	One Time	More than One Time	Total
Filled--Original		27	32	59
Filled--Photocopy		15	44	59
Refused		6	1	7

From the two new tables one can see that the ratio of multiple transactions to single transactions was higher in those instances where photocopies were received (2.13) than when originals were received (1.08).<sup>49/</sup> This suggests that ILL patrons who receive photocopies receive them with some frequency.

Although libraries and users report that originals make up a substantial portion of ILL transmittals and receipts, one should bear in mind that just as the original/photocopy mix varies among library types so, too, does it vary among types of material photocopied. Much of the debate about photocopying and copyright, and indeed the only library photocopying case which to date has been tried to a conclusion,<sup>50/</sup> concern the unauthorized photocopying of articles from serials, particularly from those styled here as scholarly, scientific, and technical (SST) journals.

49. The "multiple/single" ratio for originals is  $95/88=1.08$ ; for photocopies it is  $100/47=2.13$ .

50. Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), discussed in detail at II C(1), supra.

ILL requests for serial materials, which include "loose issues, bound volumes, and individual articles,"<sup>51/</sup> when filled, result in the transfer of a photocopy 91.2% of the time.<sup>52/</sup> In one year's time, 7,173,000 serial ILL requests were filled: 6,543,000 of those "fills" consisted of photocopies; 630,000 were originals. The opposite is true of books: 97.4% of the 9,439,000 filled requests were filled with originals rather than photocopies.<sup>53/</sup>

The parties draw different conclusions from these data. Librarians tend to discount the concerns expressed by publishers because, overall, most ILL "fills" consist of originals. Proprietors respond that the most serious copyright-photocopying problems concern serials, and those are the data which deserve the most attention. The King data do show that ILL transactions of books and "other materials"<sup>54/</sup> do not generally involve photocopying, but that does not reduce the importance of the serial data. It is there that the question of "balance" must receive serious scrutiny, since, clearly upwards of 6.5 million photocopies per year from serial materials are sent from one library to another. The data from which King calculated that statistic also reveal that librarians state that they receive permission from, or make royalty payments to, copyright proprietors for 1.1% of all serial photocopying and 0.6% of all ILL photocopying.<sup>55/</sup> It

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51. KR ILL Log Instructions at B-12.

52. KRT 3.4(a) & (b).

53. Ibid.

54. "Other materials" are those not classifiable as books or serials, including such materials as sheet music, photographs, or maps.

55. KRT 3.11.

thus may be calculated that fewer than 75,000 of the 6,543,000 serial-ILL-photocopy transactions are the subject of explicit proprietor permission. The rest are either authorized by the law or are infringements of copy-right.

Under the CONTU guidelines, libraries which receive photocopies of §108(d) material through ILL are required to:

maintain[s] records of all requests made by it for copies ... of any material to which [the CONTU] guidelines apply and shall maintain records of the fulfillment of such requests, which records shall be retained until the end of the third complete calendar year after the end of the calendar year in which the respective request shall have been made.<sup>56/</sup>

The extent to which libraries are complying with this requirement is uncertain. In examining KRT 2.18, concerning libraries' maintenance of ILL records, it is clear that libraries which keep ILL forms for more than three years (line "a" of the Table) and libraries which maintain counts of articles/ titles requested (provided such records are kept for the time required) (line "d"), are complying with the law. Since the time of retention is not specified in the latter entry, all one may safely say is that line "a" respondents are in compliance, line "d" respondents may be in compliance, and line "b" and "c" respondents (who retain ILL forms for less than three years) are violating the law unless they have other records

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<sup>56</sup>. CONTU Guideline No. 4, Conf. Rep. No. 1733 at 73.

which they retain for a sufficient time. Because of possible areas of overlapping among the lines of this table, all that is certain is that 51.1% of all libraries are clearly complying with the law and some smaller percentage (between 10 and 50%) is not keeping the required records.<sup>57/</sup>

The CONTU guidelines, which are the source of this record-keeping requirement, were created to cover what CONTU and Congress were told was a substantial majority of ILL serial transactions: those concerning articles less than five years old. Some data in the KR show that there is significant traffic in older works, to which the guidelines, by their very terms, do not apply. Of items requested via ILL where the publication year was recorded, fully 53% were more than five years old. In academic libraries, where serials comprised more than 60% of the ILL requests, 55.7% of the "year known" requests were for works more than five years old.<sup>58/</sup>

The frequency with which older materials are photocopied is also reflected in the user surveys. There, of patrons who recalled the publication date of the last item they had photocopied, 34% stated that it was more than four years old. In observing the specific works which the surveyed users were actually photocopying, the percentage increased to 45%.<sup>59/</sup> These results suggest that photocopying in libraries, by library staff or patrons, occurs in significantly greater quantities with respect to older materials than was previously thought. As is discussed elsewhere,<sup>60/</sup> there

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57. If all of the "d" libraries keep their records for a sufficient time, then there is 90.8% compliance; if none of them does, there is 51.1% compliance. It seems reasonable to assume that the truth lies somewhere in between.

58. KRT 3.3(a) & (b).

59. KRT 5.11 & 5.27.

60. See, text supra, IV A(4).



is substantial uncertainty in the library community about the legal status and rules to be followed, in the absence of CONTU-type-guidelines, with respect to these older works. Given the already noted low payment/permission/refusal frequencies, it appears that this uncertainty is generally resolved in favor of making photocopies from such works.

The relationship of the increased automation of many library functions to the incidence of library photocopying, particularly in an ILL context, concerns many copyright proprietors. Their concern appears to be that an "all electronic" system, containing "on-line" bibliographic data bases (rather than printed indexes and union catalogues) with which a user may order photocopies on the same electronic equipment used to learn of an article's whereabouts, poses a much greater threat to them than conventional ILL activities. Clearly, such activities are more efficient (and, as functional mechanisms, arguably systematic) than an all paper, mail-based system. However, the King data show that there is a positive correlation between the number of computer searches<sup>61/</sup> performed in a library and the number of serials to which that library subscribes.<sup>62/</sup> Likewise, the data show a positive relationship generally between computer searches and ILL requests, and between serial subscriptions and ILL requests. While we accept, and repeat, King's caution concerning mistaking correlation for causality,<sup>63/</sup> the data do seem both to bear out and contradict the fears of the proprietors: libraries which do substantial computer searching of bibliographic data bases do make substantial quantities of ILL requests;

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61. See Questions 44 & 45, KR at A-18.

62. KRT 2.27.

63. KRT at 2-37.

but, they also subscribe to more serials than libraries which do less computer searching. A plausible explanation for this may be simply that large libraries, which have superior holdings and computer capabilities, draw users whose research needs exceed even the substantial resources of such libraries, thus causing them to be significant ILL borrowers. At all events, the data show that nearly half of all libraries (and 70.5% of SFP libraries) engage in computer searching, with 19.5% of the "computerized" libraries doing on-line document ordering. Whether this level of technology was foreseen by Congress in 1976 is a moot question. The issue to be faced today is whether the all-but-guaranteed further growth of such systems will, or should, permit the photocopying resulting therefrom to be subject to as little proprietary control as the KR data reveal to be true at present.

A library which does not possess a copy of a work desired by a patron need not always resort to making an ILL request to obtain a copy. In addition to the obvious route of buying a copy from a publisher or dealer, a library may seek out a commercial document delivery service. Such services provided libraries, in 1980, with just under two million documents for a total price of just under \$6 million.<sup>64/</sup> SFP libraries use these services more frequently and heavily than any other library type. They buy 96.5% of the documents sold to all libraries by such services, and make 94.8% of libraries' payments to them. This said, however, one might note that only one-third of SFP all libraries use such services.

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64. KRT 2.24.

The growth of ILL photocopying between 1976 and 1980 was roughly two per cent per year for all libraries and roughly four per cent per year for non-public libraries.<sup>65/</sup> The KR contains language indicating that these numbers did not comport with prior expectations. The interesting and unanswerable question is the extent, if any, to which this growth was limited by the enactment of the present copyright law. King hypothesizes that the law, budgetary pressures, and changing acquisitions patterns may all have limited that growth. It is probably less important to determine why ILL photocopying grew as it did during that period than it is to determine whether the present quantity of ILL photocopying without permission from copyright proprietors is compatible with a proper balance.

#### n. "Staff" Photocopying: Local & ILL.

(i) General Characteristics. As previously noted, much attention has been paid to photocopying in the ILL context. Section 108(g)(2) of the copyright law, its proviso permitting certain "interlibrary arrangements," and the CONTU guidelines, all address issues related to the ILL process. Witnesses from proprietary and library communities have emphasized ILL issues in their testimony before the Copyright Office. Nonetheless, the KR indicates that in all types of libraries, photocopying transactions of a local nature exceed ILL transactions with respect to all kinds of works. When all local and ILL photocopying transactions are compared, the former constitute 72% of the mix.<sup>66/</sup> Among library types, the range is

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65. KRT 3.7 and accompanying text.

66. Calculated from KRT 3.10 which shows (albeit in percentage terms) 5.3 million ILL photocopy transactions and 13.7 million local photocopy transactions.

from academic libraries (56% local) to special libraries (79.5% local).<sup>67/</sup> Among types of source items, 78.2% of book photocopying transactions are local, as are 65.3% of serial transactions.

(ii) Age of Works Copied. The photocopying done by library staff members, for all purposes, appears to have characteristics similar to ILL photocopying: a substantial majority are serial transactions, 25.3% involve copying of serial materials more than five years old.<sup>68/</sup> Again, library patrons seek and obtain copies of older material more frequently than was widely believed by the parties and, perhaps, by Congress and CONTU.

(iii) Notice of Copyright. The preparation of photocopies under the provisions of section 108 requires library compliance with certain terms set out in the law. As previously seen, libraries requesting ILL copies must certify to their supplying libraries that their requests comply with the CONTU guidelines,<sup>69/</sup> and supplying libraries should provide photocopies only to libraries which provide adequate certification. In addition to these ILL requirements, all "108" copies must include "a notice of copyright." The level of compliance with this requirement depends upon whether one believes, that this requires the reproduction of the statutory notice

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67. These numbers are slightly larger than those in the KRT because they reflect the "local" portion of those transactions which librarians classified as local or ILL. The "other" transactions, to which librarians did not assign either term, are here ignored, on the ground that the data from the classified transactions are more reliable than those concerning a type of transaction equivalent to "unknown." It was the intent of the Copyright Office that all transactions be labelled "local" or "ILL."

68. KRT 3.10.

69. For a discussion of the issues raised by the certification form drafted by the American Library Association, see, text supra, IV A(4).

of copyright,<sup>70/</sup> or, as library representatives have usually argued, that affixation to the photocopy of a warning that a work may be in copyright is sufficient.<sup>71/</sup> As can be seen in KRT 3.6, with respect to serials (copies from which comprise 94.1% of the ILL fills to which the table is addressed), 78.7% of the photocopies contained either the notice affixed by the publisher, the warning added by the library, or both. This ratio is very similar to the datum in KRT 3.11 which shows that, with respect to ILL and local copying, 77.8% of the serial materials bore a copyright notice on the original. It appears that libraries are affixing or ensuring the appearance of some type of "notice" on virtually all photocopies prepared from serial materials which bears a notice. If, however, reproduction of the "statutory notice" is indeed required, then compliance with respect to serials is poor, since only 21.5% of the serial fills contain a reproduction of the notice from the original.

The effect of a statutory copyright notice upon library patrons engaged in photocopying may be inferred from KRT 5.30. There one sees, for example, that roughly 30% of such patrons said they had never seen a copyright notice, that they did not know what it meant, ignored it, or otherwise paid no attention to it.<sup>72/</sup> While it is clear that the notice has rather precise effects with respect to copyright proprietors, and somewhat

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70. The form of such notices is set out in §§401-403 of the Copyright Act. The requirement generally is that a notice contain the word "copyright," the abbreviation "copr.," or a "c" inside a circle, together with the name of the copyright owner and the year in which the work was published.

71. For a thorough discussion of this issue, see, text supra, III A(3).

72. The text preceding KRT 5.30 shows that the users whose perceptions were tabulated as "other" gave the last two responses about half of the time.

less precise effects on libraries seeking to preserve their "108 status," it is less clear to what extent library patron behavior is affected by the presence of the copyright notice.

(iv) Photocopying Volume. The KR contains a large quantity of data concerning the volume of photocopying which occurs in libraries on an annual basis. The data, which appear at several different places, are of three major types: annual aggregate data, per-transaction data, and trend data. Each is important; and each gives its own perspective on the existence of a balance.

(A) Annual Aggregate Data. The 1980 data which are most important include the following items (many of which have already been set out in this chapter):

- . 4.97 billion "impressions" (pages) were made in libraries. (KRT 2.11 and surrounding text).
- . Two-thirds of all non-public libraries operated a "photocopy service." (KRT 2.12).
- . 91.2% of all libraries made ILL requests. (KRT 2.17).
- . 84.7% of all libraries received ILL requests. (KRT 2.19).
- . There were some 24.9 million ILL requests (KRT 3.3). Of the 5.3 million photocopies made to fill such requests, 0.6% were the result of payment to or permission from copyright owners. (KRT 3.11).
- . There were 22.6 million transactions in which libraries made one or more photocopies from a work for their patrons, their own collections, or for other libraries. (KRT 3.9). 1.1% of these transactions were the result of payment to or permission from copyright owners. (KRT 3.11).
- . During a six-month period, more than half of all library patrons made or obtained photocopies of library materials. (KRT 5.4).

These aggregate data show the extent to which photocopying has become significant to libraries and their patrons. They also show the extent to which photocopying transactions occur independently of any control on the part of copyright proprietors. Whatever one believes they show about balance, however, it is well to consider the "per transaction" and the "trend" data before reaching a conclusion.

(B) Per-Transaction Data. The aggregate data just discussed are the products of chapters two, three, and five of the KR. Results from chapter two are from the library questionnaire,<sup>73/</sup> whose completion was presumably based in many instances upon regularly-kept business records. Results from chapters three and five, however, are based upon transaction-by-transaction records kept either by librarians (the ILL and photocopying transaction logs of chapter three) or by employees of King Research (the user survey forms of chapter five). All of the per-transaction data are taken from these latter chapters, which means that their accuracy should be quite high since the records were made contemporaneously with the transactions.

In analyzing the data contained in KRT 3.9 through 3.13 it became clear that two somewhat contradictory statements could fairly be made about the photocopying transactions in which libraries engage. On the one hand, roughly two-thirds of all transactions (and roughly three-fourths of all serial transactions) are transactions in which one copy is made.<sup>74/</sup> While

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<sup>73</sup>. Appendix A to the KR.

<sup>74</sup>. KRT 3.10.

those transactions are not thereby necessarily lawful,<sup>75/</sup> it is clear that §108 authorizes only single-copy transactions.<sup>76/</sup> Whenever multiple photocopies are made from a copyrighted work, the transaction must be authorized by the copyright owner or §107 (fair use), or it will constitute an infringement of copyright.

The contradictory statement is that a surprisingly large number of multiple-copy transactions are reflected in KRT 3.9 through 3.13. One need only compare the column headings in KRT 3.9 and 3.10 (where the numbers of transactions are given by library and source type) with the numbers of copies made in those same transactions in KRT 3.12 and 3.13 to see, for example, that for all transactions, a mean of 4.2 copies per transaction obtains, while the mean for all ILL transactions is 3.2, and for all serial transactions, 2.9.<sup>77/</sup>

Out of concern that these means did not precisely describe the distribution of copies-per-transaction, the Copyright Office asked King to provide it with data divided more finely than in the tables in the KR. Those data are reproduced below and discussed immediately thereafter.

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75. "Related or concerted" copying (even of single copies) of which a library is "aware" is unlawful; so too is "systematic" copying unless authorized by the ILL proviso. Section 108(g)(1) and (g)(2). See, text supra, IV A (4)(c).

76. Section 108(a).

77. 95.4 million copies from 22.6 million transactions equals 4.2 copies per transaction; 17.0 million ILL copies from 5.3 million ILL transactions equals 3.2 copies per ILL transaction; and 38.0 million serial copies from 13.1 million serial transactions equals 2.9 copies per serial transaction.



TABLE K1

## Distribution of Copies Per Transaction

<u>A</u>	<u>B</u>	<u>C</u>	<u>D</u>	<u>E</u>	<u>F</u>
<u>Copies per Transaction</u>	<u>% of all Trans.</u>	<u># of Trans.</u>	<u>% with Copyright notice</u>	<u># of Trans. w/notice</u>	<u># of Copies from E</u>
1	69.5%	15,687,000	66.2%	10,385,000	10,385,000
2	9.0	2,032,000	58.0	1,179,000	2,358,000
3	3.7	844,000	47.1	398,000	1,194,000
4	3.5	797,000	61.8	493,000	1,972,000
5	1.8	402,000	54.3	218,000	1,090,000
6	2.1	483,000	63.2	305,000	1,830,000
7	1.4	316,000	61.5	194,000	1,358,000
8	1.3	291,000	57.7	168,000	1,344,000
9	0.8	178,000	59.4	106,000	954,000
10	1.0	214,000	46.8	100,000	1,000,000
11	0.5	104,000	61.7	64,000	704,000
12	0.6	129,000	44.3	57,000	684,000
13	0.5	104,000	56.3	59,000	767,000
14	0.4	99,000	53.7	53,000	742,000
15	0.3	70,000	53.8	38,000	570,000
16-20	1.1	239,000	60.3	144,000	2,304,000*
21-30	0.9	192,000	48.7	94,000	1,974,000*
31-40	0.4	84,000	39.2	33,000	1,023,000*
41-50	0.6	131,000	19.1	25,000	1,025,000*
51-100	0.4	95,000	30.9	29,000	1,479,000*
101+	0.3	72,000	25.0	18,000	1,818,000*

\* Assumes all transactions in this range were of the minimum number of copies in the range.

TABLE K2

Percent of Transactions, by Whether Notice on Original,  
by Copies Per Transaction

<u>Copies Per Transaction</u>	<u>Copyright Notice on Original</u>	<u>No Notice on Original</u>
1	73.3%	63.1%
2	8.3	10.1
3	2.8	5.3
4	3.5	3.6
5	1.5	2.2
6	2.2	2.1
7	1.4	1.5
8	1.2	1.5
9	0.8	0.9
10	0.7	1.4
11	0.5	0.5
12	0.4	0.9
13	0.4	0.5
14	0.4	0.6
15	0.3	0.4
16-20	1.0	1.1
21-30	0.7	1.2
31-40	0.2	0.6
41-50	0.2	1.2
51-100	0.2	0.8
101+	0.1	0.7

f of Transactions

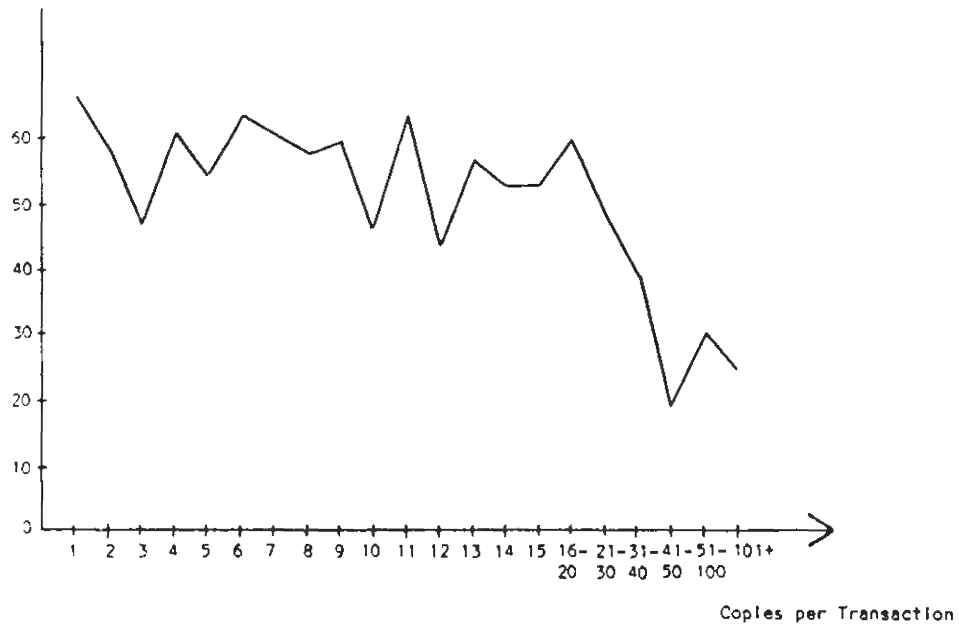


Figure K1

Distribution of Copies per Transaction in Which  
a Copyright Notice appears on the Original.

f of Transactions

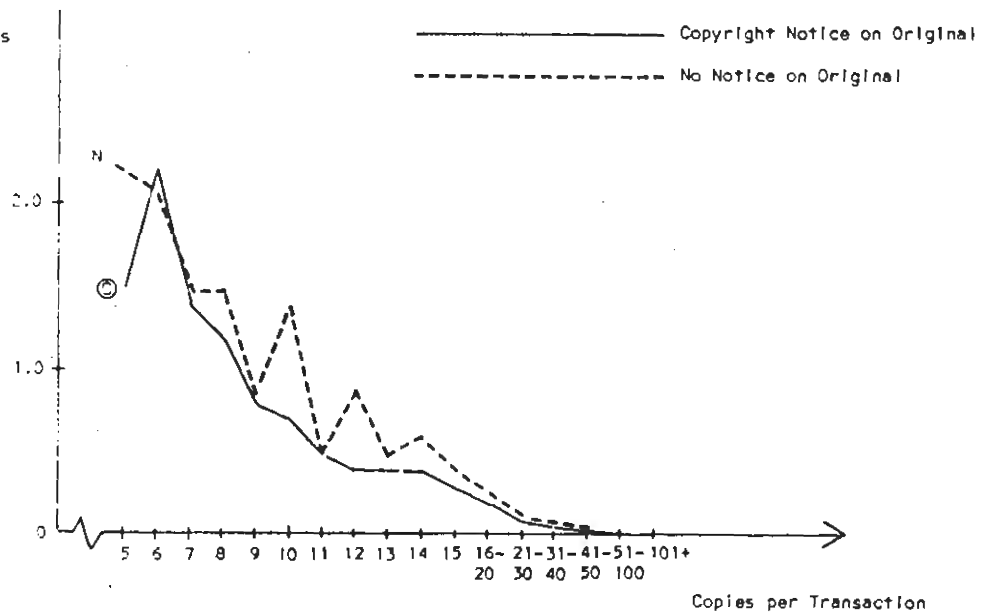


Figure K2

Percent of Transactions (5 or more copies), by Whether  
a Copyright Notice appeared on Original.

The data permit inferences to be drawn about the effect on the level of copying of the appearance in a work of the copyright notice.<sup>78/</sup> Table K2 shows that the presence of the notice increases, by about ten percent, the percentage of single-copy photocopying transactions. In multi-copy transactions, as shown in figure K2, the presence of the notice appears slightly to reduce photocopying activity at most levels.

Table K2 also shows that when the notice appears on the copied work, multiple photocopies are prepared in more than 25 percent of all transactions. As is discussed in chapter three of this report, §108 never authorizes the preparation of multiple photocopies of copyrighted works. And, of course, the preparation of one copy at a time is not always lawful, since if it is "concerted or related" or "systematic" (and not "saved" by the ILL proviso), §108 does not permit it.

As mentioned in the previous chapter, according to the data in Table K1, a conservative estimate of the number of copies prepared by libraries in 1980 in five-copy and larger transactions where copyrighted works are photocopied is 20,666,000. This estimate ignores the copies prepared in transactions in which two, three, or four copies are made, and assumes that all transactions tabulated by King as, e.g., 16-20 copies, resulted in the preparation of the minimum -- here 16 -- number of copies. Since no more than 1.1% of all transactions were the subject of permission or payment, it appears that the multiple-copy transactions reported here may represent substantial infringements of copyright.

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78. Although copyright may subsist in a work which bears no notice, the division in Tables K1 and K2 is based on notice since that is, or should be, instructive to persons desiring to make photocopies, and since §405(b) of the Copyright Act provides that persons misled by the absence of a notice from an authorized copy of a copyrighted work may avoid liability for infringements committed unless they have received actual notice that a claim to copyright in the work has been registered.

The curves plotted in Figure K2 show that at these "5 plus" levels the percentages of transactions are fairly close together and decline in a very similar manner for both "notice" and "no notice" copying. This suggests that the near-universal economic phenomenon of decreasing marginal utility, rather than copyright, accounts for the downsloping curve with respect to the "notice" transactions. To be sure, at most levels of copying the appearance of notice slightly reduces the incidence of copying, but as the graph in Figure K1 suggests,<sup>79/</sup> the effect of notice looks rather constant between two and twenty copies per transaction; only for transactions larger than that does the incidence of notice decline significantly as the copying quantities increase.

The data discussed above were not the subject of public comment since they were received by the Copyright Office in December, 1982. Earlier data, in which the division between "notice" and "no notice" copying did not appear, were presented to the Advisory Committee for comment. Most members expressed surprise at the incidence of multiple copying, and it was suggested that in some instances the logs kept by librarians, from which the data were taken, may have contained some entries reflecting page numbers in the space provided for entering the number of copies made.<sup>80/</sup> There is no way to determine whether, or how often, this occurred, but the smoothly downsloping curve (in Figure K2) concerning "notice" transactions suggests that it was not a frequent occurrence, at least in this

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79. This graph presents the data from Column D at Table K1 in graphic form.

80. The instructions concerning the "copy number" entry appear in the KR at B-5.

important area. The user survey<sup>81/</sup> and previous work by King<sup>82/</sup> show that the number of pages made in an "average" photocopy transaction is between eight and ten.

Library patrons who make photocopies of library materials appear, on the whole, to make fewer copies per transaction than do the library employees whose copying behavior has just been discussed. "Entrants" recalled making a mean of 1.7 copies per transaction.<sup>83/</sup> (Of those who could recall whether the last item they had photocopied bore a copyright notice, 69% stated that it had).<sup>84/</sup> "Copiers," whose copying activity occurred simultaneously with the recording of the data, made a mean of 2.6 copies per transaction,<sup>85/</sup> from works which bore a copyright notice 65.8% of the time.<sup>86/</sup>

(C) Trend Data. These data, concerning changes in library experience and practices between 1976 and 1980, have drawn much attention in the communities which are interested in this report.<sup>87/</sup> The most important trend data include the following:

- Book expenditures increased 7% in real terms (i.e., after allowing for inflation). Serial expenditures increased by a real 12%, but public libraries' serial expenditures declined 1% in real terms. (KRT 2.7).

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81. See KRT 5.14.

82. 1977 King Report.

83. KRT 5.15.

84. KRT 5.12.

85. KRT 5.29.

86. KRT 5.28.

87. See, for example, Publishers Weekly, (June 11, 1982), at 14, and, App. VII at 64, 108, and 127.

- The number of photocopy machines per library increased 33% overall, from 4.5 to 6.0. The increases in academic and federal libraries were each 70%, while the "public" increase (28%) was the second smallest. The number of "coin-op" machines per library increased overall by 31%. Again, the percentage increases in academic and federal libraries were the largest, while here the "public" increase was the smallest. (KRT 2.9).
- 62.2% of the libraries having "reserve" operations reported changing their practices for copyright reasons. (KRT 2.16).

An important caveat is in order: trends were calculated from data presented by libraries in 1981 concerning both 1976 and 1980. Two other trends, concerning ILL staff photocopying, are the results of calculations by King Research in which it compared 1980 data gathered under its contract with the Copyright Office with data it gathered for its 1977 report prepared for three other agencies. As King notes<sup>88</sup>/ there is less than perfect congruity between the samples from the two surveys. This means that the three trends discussed are extrapolated from the "trend experience" of the entire 1981 library sample, while the next two trends represent extrapolations from samples taken at different times, whose memberships were substantially different, and, most important, who were asked substantially different questions. Because the 1977 report considered a class of transactions styled "intrasystem," whereas this report concerns only local and ILL transactions (with the former intrasystem

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88. KR at 3-23.

transactions now called "local"),<sup>89/</sup> the ILL trends projected by King may be entitled to less confidence than those described by libraries in the data they supplied in 1981.<sup>90/</sup>

- The number of serial interlibrary loan requests which were filled with photocopies appeared to increase, overall, by 9%. Public libraries appear to have experienced a decrease of 22%; if they are omitted from the calculation, the overall increase is 17%. (KRT 3.7).
- The number of photocopies made by library staff members appears to have decreased, overall, by 16%. If public libraries, who report a decrease of 23%, are omitted, then the overall decrease becomes 8%. Special libraries (SFP and SNP together) report a decrease of 45%; academic libraries an increase of the same percentage. ILL photocopying appears to be up 62%, but serial photocopying is down 21%. (KRT 3.14).

Although some of these trend data appear contradictory or confusing, there are some insights to be gained from them, particularly when taken in conjunction with the rest of the KR. The real increase in expenditures by libraries shows that, whatever the effects of photocopying, libraries are increasing their acquisitions budgets even as their overall budgets are under great pressure. Recent and severe budgetary constraints on public libraries are all too well-documented. Reductions in staff positions, hours of operation, services, and purchases in San Francisco and Boston were the subject of two articles in the same issue of a respected

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89. See "Transaction Type" instructions in the KR at B-6.

90. This uncertainty is not a criticism of King's methods. It simply is a function of the changes between the 1977 and 1981 surveys, particularly with respect to the changes in types of photocopying transactions. If that had not occurred, the data would be much more comparable than they are.



library periodical.<sup>91/</sup> Nearly annual substantial reductions in the Denver Public Library's services between 1976 and 1982 caused that city's library commission to institute substantial fees for nonresident users.<sup>92/</sup> These constraints may well be responsible for the fact that public libraries reported the only real decrease in any expenditures: a 1% decrease for serials, as against an overall increase of 12%.

Evidence of greater fiscal pressure on public libraries than on others may also appear in the machine population trend: the second smallest percentage increase in machines per library, and the smallest increase in "coin-ops" occurred among these libraries. Together with the decrease of 22% experienced by such libraries with respect to ILL photocopy "fills," the common thread through all these trends is the reduction in growth patterns and outright reductions in several kinds of services which have occurred in public libraries. The King data offer no way to discern the extent to which such reductions share with increased copyright awareness (or other reasons) the "responsibility" for the reported 22% ILL decrease or the 23% decrease reported in staff photocopying. Thus it may be informative to examine the data in KRT 3.7 and 3.14 both in the aggregate and by library type, so as to see trends in those sectors not as greatly affected by budget cuts as were public libraries.

In the non-public sector one sees stronger growth in serials acquisitions expenditures, machine populations, and ILL photocopy "fills." An important question, which can not be answered from the data alone, is:

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91. See Bourne, Surviving the Present: San Francisco Public Library, 55 Wilson Library Bull. 736 (1981) and Hickey, Boston Public Library: Balancing the Books, 55 Wilson Library Bull. 743 (1981).

92. See Cayton, Daring to be Different: The Denver Public Library, 56 Wilson Library Bull. 504 (1982).

Assuming budget considerations have reduced all types of public library services, what can one make of the widely varying data in KRT 3.14 which offer such apparently anomalous results as a 21% reduction in serial photocopying by all libraries, a 45% reduction in staff photocopying by special libraries, but a 62% increase in ILL photocopying by all libraries?

Considering the change in scope of the term "ILL" between the surveys in 1977 and 1981, the absence of certain previous data, and the solid evidence of substantial growth in machine populations, probably few sound conclusions can be drawn from this data.

It may be, for example, that "special" staff photocopying is down because of the use of document delivery services by SFP libraries. Or it may be that "local" copying by staff members is down because of increased patron reliance on coin-operated machines. There are, unfortunately, no 1976 data from which to draw any comparisons to test these hypotheses.

A common perception among those who have commented upon the KR is that the data show that there has been

an overall decline of 16% in the number of copies made of books, serials and other materials between 1976 and 1981.<sup>93/</sup>

(v) Library Justifications for Photocopying.

The quantity of photocopying done by and in libraries is not the only issue to be discussed in addressing the "balance" question. The legal status of the copying which takes place, however large or small the quantities, is also of fundamental importance. KRT 3.11 tabulates the judgments made by librarians, as they filled in the photocopying transaction logs, concerning their legal bases for the photocopying they did. In

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<sup>93.</sup> Publishers Weekly, (June 11, 1982) at 19.

examining the Table one should note that the instructions for the photocopying transaction logs included a note that the "copying status" entries (which give rise to the Table) were to be reviewed by someone "with familiarity with copyright issues."<sup>94/</sup> This was done to ensure that data reflecting the positions taken by libraries concerning the legality of various photocopying transactions would be provided by persons with the best possible understanding of copyright.

KRT 3.11 suggests that in certain instances the law is being misunderstood or disobeyed. The five columns in the Table were designed to include all possible lawful justifications for the preparation of a photocopy of a work: fair use, §108 (including the CONTU guidelines), permission without payment, payment for permission, or the absence of copyright in the work. Nonetheless, more than two million transactions (just under 10% of all staff photocopying) fell outside these five categories. As against this volume of arguable infringements, barely more than one percent of all transactions were performed with permission from the copyright owner, with or without payment. The extent to which these transactions reflect a serious misunderstanding of the law can not be learned from the data, but the scope of the problem appears significant.

One of the most surprising results shown in KRT 3.11 is that librarians invoke the provisions of §107 (fair use) and §108 with virtually equal frequency to justify photocopying for ILL purposes.<sup>95/</sup> Whether this reflects confusion or the staking out of a strong position that fair use is broadly available on a recurring basis when §108 privileges have been

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<sup>94.</sup> KR at B-6.

<sup>95.</sup> The legal grounds for ILL transactions are stated to be fair use, 43.3%; section 108, 45.1%.

exhausted is, again, unclear. If it should be the latter, however, then the intended balance is in serious jeopardy, because it should be clear to all concerned that ILL photocopying is systematic and lawful only to the extent permitted by the proviso to subsection 108(g)(2), and only when its terms (rather than the more nebulous terms of §107) are met. As discussed elsewhere in this report,<sup>96/</sup> fair use should properly have a very small role to play in ILL photocopying. While reasonable people may disagree how large or small the role of fair use in ILL should be, at all events it is not available for more than 40% of all ILL transactions.

(vi) Permissions and Royalty Payments.

Only 12.2% of all libraries reported ever asking for permission to photocopy during 1980<sup>97/</sup> and, as KRT 3.11 shows, permissions (both free of charge and for royalty payments) existed for only 1.1% of all staff photocopy transactions. One may question whether Congress intended to invite the active participation of creators and copyright owners in such a tiny fraction of the photocopying activity which takes place in libraries.

Librarians sometimes state that requesting permissions is time-consuming and unproductive because responses from publishers are often not forthcoming. The King data do not bear this out. First, fewer than one-eighth of all libraries ever ask for permission at all. Second, it appears that most requests are answered. While there is no identity of requests, permissions, denials, and pending/nonresponses in KRT 2.21, one may see that denials generally amount to no more than three percent of all requests and that all libraries, on the average, had fewer than three requests to

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<sup>96/</sup> See text supra, IV A(4)(c).

<sup>97/</sup> KRT 2.21.

which publishers had not responded. Since 95.5% of the requests appear to result in responses (i.e., permissions or denials), it is fair to assume that the overwhelming majority of "pending" requests will ultimately receive responses.

Still fewer libraries ever pay photocopying royalties (5.9%)<sup>98/</sup> and fewer transactions are the subject of payments (2/10 of 1%)<sup>99/</sup> than is the case with permissions in general. And, as the publisher survey showed, the amount of money derived from photocopying royalties is so small as to be nearly invisible as a fraction of total revenues.<sup>100/</sup>

i. Other User Data.

Of all patrons entering all types of libraries, 62.8% of them had made or obtained photocopies of library materials in the preceding six months.<sup>101/</sup> Such "photocopy patrons" (PP's) appear to do a substantial amount of photocopying. Indeed, the most common response from PP's was that they had made or obtained photocopies from such serials seven or more times during the six-month period.<sup>102/</sup> While such copying is usually done on a single-copy basis, its cumulative effect should not be downplayed.

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98. KRT 2.22.

99. KRT 3.11.

100. SST journal publishers show mean photocopying revenues of \$200 for 1980, as against \$602,000 mean total revenue. \$200 is 3/100 of 1% (\$3 per \$10,000) of \$602,000. (KRT 4.9).

101. KRT 5.4. Indeed, of the 21 libraries where users were surveyed, at fully 18 of them (and at all the non-public libraries) a majority of the entering patrons had that level of photocopying involvement. (KRT 5.5).

102. KRT 5.7.

Patrons make or obtain photocopies of library materials for a variety of reasons. Overall, job-related reasons (including teaching) were given slightly more often than study-related reasons.<sup>103/</sup> But there was a sharp distinction between the predominance of job-related copying in federal libraries ("entrants": 88.6%; "copiers": 91.3%) and SFP libraries ("entrants": 68.5%; "copiers": 77.8%) and the frequency of study-related copying in academic ("entrants": 65.8%; "copiers": 62.5%) and public ("entrants": 37.9%; "copiers": 42.7%) libraries. Congress may need to consider the extent to which copyright owners should be obliged to contribute, without compensation, to the money-making activities of those library patrons whose photocopying is job-related.

Between one-quarter and one-fifth of all patrons ask their libraries to obtain works for them from other libraries.<sup>104/</sup> Their requests are almost always filled, with rare reports by users that copyright considerations led to refusals.

Similar percentages of patrons asked their own libraries to make them copies from their own collections.<sup>105/</sup> More than 90% of such requests were filled,<sup>106/</sup> with the only "copyright refusals" occurring with respect to music, for which libraries do not currently have any §108 privileges when it comes to copying for patrons.<sup>107/</sup>

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103. KRT 5.10 & 5.25.

104. KRT 5.17 & 5.21.

105. KRT 5.16 & 5.21.

106. KRT 5.16 and text at 5-31.

107. 17 U.S.C. §108(h)(1980).

All in all, it appears that for a significant portion of the library user community, the library has become the location for acquisition of as well as access to copyrighted materials.

### 3. KR Chapter Four. Publisher Survey.

King Report Table 4.2 shows that the population of publisher respondents is distributed differently from the U.S. publisher population. Although the Copyright Office is disappointed with the response level, the distribution difference may be of little consequence, since publishers of SST journals and books are well represented, with the only serious underrepresentation occurring with respect to publishers of "other serials only," i.e., publishers of neither non-SST periodicals nor books. Given the emphasis of and on SST journal publishers, the presence of substantial amounts of data from them permits some conclusion to be reached.

The data from the publisher survey show mixed signals, as do the library and user data. On the one hand, revenues of serial publishers showed substantial real increases (i.e., increases after allowing for inflation) between 1976 and 1980: 41% for all serial publishers and 50% for the publishers of SST journals.<sup>108/</sup> During the same period the ratio of serial "births" to "deaths" was 3.4 to 1,<sup>109/</sup> and of journals reporting changes in circulation, 73% of SST journals and 83% of other serials reported increases.<sup>110/</sup>

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108. KRT 4.9.

109. KRT 4.5.

110. KRT 4.6.

As is recounted elsewhere,<sup>111/</sup> authors and publishers created the Copyright Clearance Center, Inc. (CCC), to facilitate photocopying beyond the bounds of §§107 and 108 and to authorize it in institutions not eligible §108 privileges. While the growth of the CCC has been slower than publishers might like, by October, 1982 some 5,367 SST journal titles were registered.<sup>112/</sup> In 1980, 43.5% of the SST titles published that year were registered with the CCC.<sup>113/</sup>

The other side of the publishing picture is shown in some of the circulation, permissions, and royalty data. The almost three-quarters of all SST journals which have circulations of under 10,000<sup>114/</sup> are vulnerable to any events that would even marginally reduce their circulations. With photocopying revenues averaging only \$200 per SST publisher in 1980,<sup>115/</sup> any photocopying of such limited-circulation works that amounted to a substitution for subscriptions or purchase of authorized reprints, could have disastrous effects.

In 1980, SST journal publishers received a total of \$665,000 in photocopy royalty revenue from all sources, which was almost 70% of all publishers' photocopying revenue.<sup>116/</sup> SST publishers may have forgone as much as \$27 million in revenue as their "share" of the \$38.6 million forgone by all publishers because of multiple photocopying.<sup>117/</sup> This would

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111. See, text supra, IV D(1)(b)(i)

112. Letter from CCC dated December 10, 1982.

113. KRT 4.5

114. KRT 4.6.

115. KRT 4.9. One should also note that payments in 1976 were so low that the calculation of a mean was not performed by King.

116. KRT 4.11.

117. See, text supra IV A(4)(c).



publishers because of multiple photocopying.<sup>117/</sup> This would amount to almost \$8,000 per SST publisher, roughly 1.3% of such publishers' mean total revenues. While that may not sound like much, it is forty times larger than the present mean of \$200 per SST publisher, and an amount of some consequence. Further, since KRT 4.11 shows how little of the present pool of royalty monies comes from libraries, one might suspect that fair compensation for all photocopying beyond §§107 and 108 might have a substantial economic effect.

Although SST publishers report that permission requests either went up or stayed about the same from 1976 to 1980,<sup>118/</sup> the miniscule incidence of permission requesting seen in KRT 3.11 suggests that there remains room for real growth in the practice. That librarians should be reluctant to ask for permission from publishers seems somewhat shortsighted, particularly since 72.8% of the publishers of serials -- whose works are the subject of the bulk of staff photocopying<sup>119/</sup> -- grant all their permission requests in full.<sup>120/</sup> Only 34% of all serial publishers (43.7% of all SST publishers) ever asked for any payment for photocopying.<sup>121/</sup>

The incidence of permission/royalty activity (1.1% overall, with a maximum of 3.2% among special libraries) is so low that it is not surprising to learn, as one does in KRT 4.11, that only 3% of all photocopy royalty payments come directly from libraries, with 9% coming through the CCC. After all, only 5.9% of all libraries made any payments, and only

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117. See, text supra IV A(4)(c).

118. KRT 4.12.

119. KRT 3.10.

120. KRT 4.13.

121. Ibid.

5.6% belong to the CCC. The overall effect of these statistics appears to be that the publishers -- as all copyright owners -- play an extremely small role in library photocopying. Publishers see this as demonstrating the absence of the intended balance; librarians see it as reflecting the intent behind §§107 and 108.

Interesting data concerning the structure of the publishing industry are found in KRT 4.4. Roughly two-thirds of all publishers, and nearly three-fourths of SST journal publishers, are organized on a not-for-profit basis and are so treated by the Internal Revenue Service. That does not mean that they are indifferent to unauthorized photocopying. Some of the founders and strongest advocates of the Copyright Clearance Center are non-profit professional societies. They provided witnesses at several hearings who made clear their position that proprietary rights, as recognized in permissions requests and royalty payments, were important to their publishing.<sup>122/</sup> This is understandable, since any publisher, whether profit-seeking or not, can only stay in business so long as it recovers its costs of production. The apparent health of the industry suggests that as of 1980 that was generally occurring.

Cost recovery can occur, of course, through a variety of means, including subscription charges, advertising revenues, and, particularly in the case of SST journals, "page charges." In something of a reversal of the classic author-publisher role, certain periodicals require payments from authors (or their employers or other sponsors) in order to publish their works. Although the record permits no firm conclusion concerning

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<sup>122.</sup> See, e.g., Anaheim Hearing at 6 (statement of William Koch) and New York Hearing at 139 (statement of E.K. Gannett).

this, the Copyright Office believes that page charges are most likely to be imposed by professional societies. They comprise nearly half of all SST journal publishers, but only 15.1% of all other serial publishers.<sup>123/</sup>

SST journal publishers also appear to charge higher subscription prices than publishers of other serials, with 32% of individual SST 1980 subscription prices being over \$20.00, while only 14.4% of other serials were at that level.<sup>124/</sup> The imposition of a higher subscription price to institutional subscribers — chiefly libraries — by SST publishers may be seen in KRT 4.8. Here, fully 51% of the subscription prices exceed \$20.00. Although price charges between 1976 and 1980 were not tabulated for every such journal, King calculates that institutional prices rose approximately 12% per year during that time.<sup>125/</sup>

Additionally, as regards SST publishers' cost recovery, one may calculate that publishers who publish only SST journals derive roughly 10% of their total revenue from sales, whereas this percentage for other serial publishers ranges from 47% to 59%.<sup>126/</sup> The sale of reprints is another source of publisher revenue. In 1980, serial publishers sold 34.37 million article reprints, 73% of which were sold by SST publishers.<sup>127/</sup> Of the 25.2 million copies sold by SST publishers, some 63% of them were sold to authors at the time their articles were published. Indirect sales of SST reprints, through other commercial organizations, such as information

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123. Calculated from KRT 4.4.

124. KRT 4.7.

125. KR at 4-22.

126. Calculated by dividing data from row "C" in KRT 4.10 by data in row "E."

127. KRT 4.14.

brokers or document delivery services, were much smaller than the direct sales referred to above -- only 92,000 copies.<sup>128/</sup> The publisher of Scientific American was quoted on our record to the effect that annual reprint sales of articles declined from approximately 3.9 million in 1969 to 1.4 million in 1979, even though the scope of the reprint service was enlarged in 1978, when all articles from the publication became available via reprint.<sup>129/</sup>

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128. KRT 4.15.

129. New York Hearing at 99-100 (statement of Alen Wittman).

## VI. NEW TECHNOLOGY

Photocopying has been treated as a new technological phenomenon for over a quarter of a century. In a sense, photocopying technology is in its dotage; the new reprographic reproduction equipment — computers, telefacsimilie machines, electro-optical disc systems and the like — appearing in offices, schools, industry, government agencies, libraries and even the home are tools for the creation as well as the copying of works, the production of "documents," the direct acquisition of materials, and the capability of modifying or rearranging their contents.

The copying machine does not exist in a vacuum. Its place in society and the growing concerns of authors and copyright owners over its use are shaped by other technologies with which the copier may interact. Within the last decade, Americans have witnessed the introduction of a vast new array of information products made possible through technological advancements — computer data bases and general use computer software for commercial and personal computers, video cassettes and discs, subscription television programs, and electronic videogames. This onslaught of new works and methods of dissemination shows no sign of abating; the future appears to hold even more promise as teletext and videotext systems are commercially introduced, personal computers and computer networks move into the home, and serious experiments are conducted in electronic publishing. Many of these technologies already have raised questions of how best to protect authors rights in the environment they are creating.

To the consuming public the photocopy machine and the emerging information technologies serve similar broad purposes -- furnishing ever easier access to information, including that contained in copyrighted works. To the copyright owner, they pose what looks a like a "Hobson's choice;" new markets will open, but the loss of control over the reproduction right, inherent in "machine-readable" information products, will make present concerns over paper based photocopying seem insignificant. One should note in this discussion that whatever photocopying is permitted by §108, the specific privileges dealt with by that section are limited to traditional forms of facsimile reproduction and do not apply to other new technological uses of copyrighted works.

The photocopy machine operates in a paper-based system of information distribution largely governed by traditional copyright principles. If the user has one hard copy in hand, a limitless number of reproductions easily can be made. As a system of information distribution, photocopying is subject to the inherent limitations of any paper based system --securing the original hard copy, storing the original and the photocopies, and delivering the photocopies to the user. Each step necessarily consumes valuable resources, and each may have copyright consequences.

The emerging new technologies utilize electronics to avoid many of the physical limitations of the paper based system and raise new copyright problems of their own. Computer data bases, for example, enable users to locate relevant information within seconds from among thousands of entries. Storage in machine-readable form has the potential to reduce space, handling, and preservation problems associated with maintaining usable hard copies. The wide variety of electronic delivery systems being

developed today in conjunction with computer, telephone, cable, and satellite communication systems greatly enhance the ability of the user to receive needed information quickly.

The efficiencies already brought about by new information technologies have been heralded as the dawning of a new era<sup>1/</sup> that will affect every aspect of our lives. Futurists predict that the workplace will become decentralized, many employees will perform their duties at home, and literary works will be tailored to a great extent to meet the individual needs of the user.

Intellectual property — patents, trade secrets, and copyrights and information products embodying them -- will be central to the successful social management of these predicted changes.<sup>2/</sup> To cope in this increasingly complex technological environment, individuals will need ready access to an ever-growing body of information distributed via electronic means directly to their homes.

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1. Toffler, *The Third Wave* (1980); see also, the cautions of Librarian of Congress Boorstin, *The Republic of Technology* (1978)

"The tantalizing, exhilarating fact about great technological changes is the very fact that each such change (like the invention of controlled atomic fission) seems somehow to be a law unto itself, to have its own peculiar vagrancy. Each grand change brings into being a whole new world. But we cannot forecast what will be the rules of any particular new world until after that new world has been discovered. It can be full of all sorts of outlandish monsters; it can be ruled by a diabolic logic. Who, for example, could have predicted that the internal-combustion engine and the automobile would spawn a new world of installment buying, credit cards, franchises, and the annual models--that it would revise the meaning of cities, and transform morality by instigating new institutions of no-fault reparations?

2. It recently has been estimated that about 50% of all goods and services produced in the United States are information-related. Information Industry Association, Understanding U.S. Information Policy, the Infrastructure Handbook, p. 9, (1982).

Against this backdrop, it is clear that photocopying and the newer technologies must be considered in the context of the changing realities of the total information distribution system. Photocopying revolutionized the paper-based system of information dissemination; and as newer electronic technologies grow in importance, print on paper will lose its preeminent position in the dissemination of information. Legal controls and commercial practices pertaining to "copying" will have to be adapted as further "performance," "display," "reproduction," and "derivative work" questions arise. Possibly new technologies, by reducing the role of print in the publication of information, will diminish the importance of photocopying to a point where it has little effect on "publishing." New technology could also be applied to the photocopy machine to assist in the monitoring of mass photocopying. Most likely the broad copyright-photocopying problems to which this report is addressed will be transferred to the new technologies, rendering their solution even more difficult.

The solutions to these problems are not readily apparent; but whether the copyright law remains a viable incentive to creators and an effective facilitator of the dissemination of information will depend in large measure on how well the law can adapt to the changing environment. This adaptation, it must be stressed, is not limited to elevating authors' rights. It concerns, as profoundly, the continued viability of limited exemptions in the law in new contexts where there is no long-standing jurisprudence and the overall public policy favors non-discriminatory access to information. To identify areas of stress on the copyright system



in the future, this section of the report surveys the impact of the emerging technologies on librarians, publishers, and the present Copyright Act.

A. Computerization of Library and Reference Services

A modern scholar is often confronted with a frustrating dilemma; while automated library card files and computer data bases make it easy to locate a multitude of references on almost any topic, securing the works themselves is a different matter. The physical item typically must be purchased, retrieved from the library's collections or borrowed from another institution. Words such as "out of print" or "not on shelf" can mean weeks of delay in securing needed material.

The different levels of automation of the library functions of information retrieval and document delivery are the basis for this anomaly. Reference services to identify and locate information have been revolutionized by the introduction of computer technology, principally by great library institutions, but the time needed for retrieval and delivery of the works that embody the information is, today, still fixed at about the time of Gutenberg.

Technological innovation in publishing has gone more to the improvement of manufacturing processes for copies than to an infrastructure that displaced copy making and copy distribution. Innovation has challenged the efficiency of publication practices by intensifying demand for access in terms which conventional publishing practices cannot now fully meet. Thus, to obtain a copy of desired information, a researcher is usually confined to the traditional methods of either purchasing a paper

copy from the publisher or another trade source or securing a copy from a library; methods that do not keep pace with the virtually instantaneous speed with which information sources can be identified.

Librarians have tried to point out to publishers the relationship between new technological uses of copyrighted works and the failure of publishers to meet user needs on user terms:

Librarians and the educational community would prefer to cooperate with the publishing industry. There would not be so much photocopying, etc., in libraries and in school systems if publishers would offer a reprint service that met the needs of librarians and the educational community. With the available modern technology, publishers should be able to provide, on a competitive basis, copies of their publications required by the schools, without imposing a licensing or fee system on library and educational institutions. The film strips, charts, chapters, or pages of books, and the reprints of articles could all be supplied by the publishers on a cost-plus-royalty basis, low enough to encourage or entice libraries and school districts to purchase multiple copies from them rather than photocopy them. Publishers could cooperatively become involved in "demand" publishing; the production of books only after they have been ordered. To arrange for this service, the publishers should issue catalogues of their books and list the cost for copies by page or chapter, in bulk sales or otherwise. New books could list such price information on the verso of the title page. Publishers could establish cooperative regional offices to service these requests or develop other alternative systems. Eventually, these systems could be linked up with computer storage and retrieval units that would provide practically instantaneous transmission in remote, ephemeral, or hard-copy form. They could also provide microforms if requested. Once the dissemination of copy is centralized, a logical solution to the photocopying problem is possible. Publishers claim that the user of copyrighted materials is becoming a publisher by the use of photocopying machines. One way to remedy this is for the publisher to establish an improved publishing service that will provide photocopies and service at a competitive rate. Publishers have not changed their mode of operation basically since the days of Gutenberg. Some publishers are preparing for the future by merging with electronic companies. But they will have to change their mode of operation radically if they want to survive. Just as

laborers are being warned that they will not get tomorrow's jobs with today's skills, publishers should take similar heed.<sup>3/</sup>

# 1. The Private Sector in the Information Industry.

The automation of reference services has presented the private sector with entrepreneurial opportunities as information vendors. Many firms have entered this field as suppliers or sellers of computer data bases and data base access services. In addition, smaller companies have found a niche supplying copies of referenced works for a fee.

The vending of computer data bases and data base access is such a new industry that it is unclear which, if any, of the numerous companies entering the field ultimately will dominate.<sup>4/</sup> As of 1980, there were more than 1,000 data bases available for computerized searching via a variety of information access or service systems; and more businesses appear to be considering entering the field.<sup>5/</sup>

There are two principal types of products: source data bases and bibliographic data bases.<sup>6/</sup> Source data bases give the user direct access to source material, such as census data, market-research information, or the full text of legal materials. Users of source data bases typically are businessmen, economists, financial professionals, and lawyers. Biblio-

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3. 1 IFLA Journal 47-48 (1975).

4. The primary business of companies with interests in computer data bases is diverse. One article identified the following companies as having activities in the field: Lockheed, Mead, ABC, Boeing, Chase Manhattan, Citicorp, Control Data, General Electric, G.T.E., McGraw Hill, Dow Jones & Co., Dun & Bradstreet, New York Times Co., Time Inc. and Xerox. 101 Fortune 227, (May 5, 1980).

5. 208 Science (April 4, 1980).

6. Fortune, supra note 4.

graphic data bases identify and give the user the location of the information which is sought. In a sense, they are highly efficient card catalogs. The library community is one of the principal markets for bibliographic data bases.

The commercial availability of computer data bases has had a considerable impact on the library community.<sup>7/</sup> In order to provide better reference services, libraries increasingly find it necessary to subscribe to one or more of the commercially available data base access services.

The online information retrieval revolution has raised many policy issues in the library and copyright communities; one of the most controversial questions among librarians is whether libraries should charge fees to users for online searching.<sup>8/</sup> Another issue is who will protect the public interest if access to reference services essentially becomes available only to those who can afford to pay?<sup>9/</sup>

Important copyright policy issues also factor into online retrieval activities. Historically, one of the most significant of those was the point at which copyright liability might attach to computer use of copyrighted works, at the time of input or at output? Others concerned rights of reproduction, remote display and transmission. The legislative history of the 1976 Copyright Act and the Congressional action following CONTU'S recommended deletion of the original §117 have all indicated a

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7. Jacob, Dodson, and Finnegan, Special Libraries and Databases, 72 Special Libraries 103, (1981).

8. Vendors of computer data bases secure a significant portion of their revenues from charging for searching time. Thus, when a library uses a data base, the expense either must be paid by the patron or be absorbed by the library itself.

9. A recent conference attended by librarians and private sector information specialists raised but did not resolve this very point. See, Jacob, Dodson and Finnegan, supra note 7.

clear intent to apply copyright principles to computer uses of copyrighted works, including data base operations. As in other areas, the extent of the protection afforded and the applicability of fair use in specific instances remain open to speculation.

Companies supplying document delivery services also participate in private reference services. Document Retrieval Sources and Services for 1981 lists 127 private sector non-library document delivery services.<sup>10/</sup> These companies typically serve the needs of major corporations.<sup>11/</sup> The amount of business undertaken by commercial document delivery services appears substantial. The KR estimates that in 1981 these companies delivered 1,946,100 documents to libraries,<sup>12/</sup> while seven million inter-library loan requests were filled in 1981 through photocopies.<sup>13/</sup> While charges for commercial document delivery services vary, it has been estimated that the average price for a 10-page article for normal service is \$12.<sup>14/</sup>

In general, companies offering commercial document delivery services fall into one of two categories. A few, such as the Institute for Scientific Information and University Microfilms, are quite large and secure the copies, or in some cases the originals that they supply, from extensive collections which they maintain. Most, however, are small companies which often utilize the resources of nearby major academic or

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10. Strizich, and Lawhun, Document Retrieval Sources and Services, 1981.

11. Information entrepreneurs stake claims at IACUNY, 104 Library Journal 1199, (June 1, 1979).

12. KRT 2.24.

13. KR at 3-19.

14. Wood, Private Sector, Non-library Document Delivery Services, Prepared for the Association of Research Libraries, p. 3 (unpublished 1982).

research libraries. The extent that these companies tend to follow the letter of the copyright law by paying copyright royalties to publishers is unknown. Some of them apparently pay for copying or otherwise obtain full copyright permission; others make little or no effort at copyright compliance.

## 2. Creation of Information by the Government

The growth of the information industry has not been limited to the private sector. The circumstances underlying the creation of government information are so varied that there appears to be no accurate estimate of how much information is created either directly by governmental agencies or indirectly under government sponsorship.<sup>15/</sup>

With a large government presence in the information field, conflicts with private sector interests are inevitable. To some extent, the copyright law mitigates against conflict by generally denying works of the United States government the benefits of statutory copyright protection.<sup>16/</sup> Nevertheless, on occasion, government works have been brought within the copyright law. The Standard Data Reference Act, for example, permits the Secretary of Commerce to secure copyright in certain information products on behalf of the United States to recover some of the

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15. National Commission on Libraries and Information Science, Task Force Report on Public Sector/Private Sector Interaction in Providing Information Services, p. 20 (1982).

16. 17 U.S.C. §105 (1980).

costs of compiling that data.<sup>17/</sup> In addition, depending on the terms contained in grants or contracts, copyright may be asserted in the large number of works sponsored by government agencies.<sup>18/</sup>

In instances where government agencies provide reference services similar to those available in the private sector, controversies concerning competitive effects have arisen.<sup>19/</sup> In general, it is federal government policy to recoup the costs of services through user fees.<sup>20/</sup> While this policy has been applied to programs such as the National Library of Medicine's MEDLARS system,<sup>21/</sup> members of the private sector have complained that even then charges are insufficient to cover costs,<sup>22/</sup> thus presenting an unfair competitive advantage in favor of the government services.

### 3. Computerization in Public Libraries.

In 1981, it was estimated that there were 400,000 computers in the United States doing work that would require five trillion people if done by hand.<sup>23/</sup> Since a large amount of record keeping traditionally has been associated with library work, it is not surprising that the library

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17. 15 U.S.C. §290(e)(1980).

18. H.R. Rep. No. 1476 at 59; Schnapper v. Foley, 667 F.2d 102 (D.C. Cir. 1981).

19. Willard, Legislation Affecting the Information Industry in 1981, The Bowker Annual of Library and Book Trade Information, p. 195 (27th ed. 1982).

20. 31 U.S.C. §483(a)(1982); National Cable Television v. United States, 415 U.S. 336 (1974).

21. 42 U.S.C. §276(c)(1982); SDC Development Corp. v. Mathews, 542 F.2d 1116 (9th Cir. 1976).

22. Willard, supra note 19, at 197.

23. Gell, Socio-Political Impact of Information Technology, 72 Special Libraries 98, (April, 1981).

community has embraced computerization enthusiastically. Today, computer technologies are being applied to simplify library operations in cataloging, circulation, interlibrary loan, acquisitions, and related library activities.

Few libraries independently have sufficient resources to automate their operations and many library functions are substantially similar. These factors have helped foster the creation of library networks to achieve more efficient library operations<sup>24/</sup> as well as more extensive resource and collections sharing programs. The very regularized and often systematic nature of these operations has raised persistent concerns among authors and publishers over the extent to which these library operations infringe upon their rights as copyright owners.

The trend toward cooperative efforts among libraries started in the United States over a century ago with the founding of the ALA.<sup>25/</sup> In 1901, the Library of Congress started its catalog card production and distribution service, thereby establishing an informal network of libraries for the processing of materials. In the 1960's, this system was computerized through the Library's development of a format for machine-readable bibliographic records. Called the MARC format (MACHine-Readable Cataloging), the Library began distributing machine-readable cataloging data in 1969.

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24. As used in this discussion, a library network will be defined as a group of libraries that have joined together to facilitate access to a bibliographic utility and to develop mutually beneficial services and products. See Martin, Library Networking in the United States, 1981, The Bowker Annual of Library and Book Trade Information 276, (ed. 1982).

25. Martin, Library Networks, 1981-1982, p. 2 (1982).



In the 1970's, interconnection among libraries was accelerated by the formation of over two dozen regional networks.<sup>26/</sup> The increase in the number of such networks led to the establishment of the Council of Computerized Library Networks (CCLN) to coordinate the orderly development of library networking. Library networks typically provide common procedures for shared machine-readable bibliographic data bases, inter-library loans, reciprocal borrowing privileges, and coordination of acquisitions and preservation programs.<sup>27/</sup> Computer-based bibliographic utility systems make these regional networks possible. OCLC, Inc. (Online Computer Library Center) is the oldest and the largest of these systems. OCLC began processing offline catalog cards in 1970,<sup>28/</sup> and, a year later,

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26. Some of the major library networks include: AMIGOS, a network primarily composed of academic libraries in the Southwest; Bibliographic Center for Research (BCR), regional network in the Rocky Mountain Region; California Library Authority for Systems and Services (CLASS), a network operating since 1977 within the state of California; Consortium of Universities of the Washington Metropolitan Area (CAPON), offers OCLC services to libraries within the District of Columbia metropolitan area; Cooperative College Library Center (CCLC) operates a computer processing center for colleges in the southeast; Federal Library and Information Network (FEDLINK), provides services to federal libraries; Illinois Library Network (ILLINET), links the public library system together in the state of Illinois; Indiana Cooperative Library Services Authority (INCOLSA) coordinates OCLC services within Indiana; Michigan Library Consortium, provides linkage among libraries in Michigan; Midwest Region Library Network (MIDLNET) composed of 20 academic libraries in the central and north central states; Minnesota Interlibrary Telecommunications Exchange (MINITEX), well established network within Wisconsin and Minnesota; New England Library Information Network (NELINET), network in six New England states; OHIONET, successor to the organization of Ohio libraries which formed OCLC; Pennsylvania Area Library network (PALINET), network of over two hundred libraries in Pennsylvania, New Jersey, Delaware, and Maryland; Pittsburgh Regional Library Center (PRLC), Research Libraries Group (RLG), is one of the few networks to provide its own computer processing; Southeastern Library Network (SOILINET), one of the largest library networks maintaining many computer services for its members; Washington Library Network (WLN), library network in the state of Washington which maintains its own computer services.

27. Martin, supra, note 25, at 48.

28. Id., at 29.

initiated an online shared cataloging system using computer terminals installed in user libraries. From these beginnings OCLC has grown to include: (1) a national serials data base, (2) a system for the delivery of archive tapes to library customers, (3) an acquisitions system to assist users, (4) a computer data base marketed nationally through the Source<sup>29/</sup> and (5) a national circulation system.

The interconnection of libraries through online computer services has facilitated many library functions such as interlibrary loan, and a leading concern among copyright proprietors is the effect of this interconnection on coordinated collections development and the copying of protected works.

In the OCLC system, each time a library catalogs an item, the computer system automatically records that library as holding it. As a result, a library seeking an item through ILL merely has to refer to the online union catalog to locate a potential lending institution.

In a study of ILL book transactions conducted by OCLC, it was estimated that, in 1977, libraries participating in the OCLC system lent 75 percent more material than they otherwise would have; and a projection of that data indicates a fivefold increase by 1980/81.<sup>30/</sup> Recently, electronic interlibrary loan projects have created online circulation systems that automate many request and checkout functions.<sup>31/</sup> Ultimately, it is

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29. The Source, Inc., is an information utility which provides access to many computer services for personal computer owners.

30. Kilgour, Interlibrary Loans On-Line, 104 Library Journal 460, (Feb. 15, 1979.)

31. Nitecki, Impact on an On-line Circulation System in Interlibrary Services, 73 Special Libraries, (1982).

contemplated that articles themselves will be transmitted electronically, although to date only small, experimental programs actually have involved document transfer.<sup>32/</sup>

The success of regional networks and computer utilities has encouraged efforts toward the establishment of a national library network. The proposal to establish a National Periodical Center is clearly an outgrowth of this movement.<sup>33/</sup> Several government agencies and organizations have been in the forefront of these discussions, and the Library of Congress, through its sponsorship of the Network Advisory Committee, has considered the problems in achieving a national system. The National Commission of Libraries and Information Science (NCLIS) has studied aspects of the issue, particularly the feasibility of a National Periodical Center and the role of the private sector in a national scheme of information distribution.<sup>34/</sup> The Council on Library Resources, a Ford Foundation funding organization, has supported joint projects with other organizations to improve coordination of library operations.<sup>35/</sup> Finally, organizations such as the ALA, the ARL, and the CCLN all have sponsored programs concerning national networking.<sup>36/</sup>

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32. R. Veenstra, Electronic Mail Has a Future in the Library, 72 *Special Libraries*, (1981).

33. The Higher Education Amendment Act of 1980, P.L. 96-394, 94 Stat. 1367 (1980), authorized the creation of the National Periodical System Corporation to study the feasibility of a National Periodical Center (Title II, sections 241-251). However, due to a funding limitation contained in section 201(b)(2) of the Act, it appears unlikely that the National Periodical System Corporation will be funded in the foreseeable future.

34. National Commission on Libraries and Information Science, supra note 15.

35. Martin, supra note 25, at 87.

36. Id. at 88-89.

Although, at one time, it appeared that a nationwide bibliographic network could be achieved relatively quickly, that no longer seems likely. As might be expected, the primary stumbling block is cost. Within the library community itself, criticism has been voiced that a national network would raise the costs for all libraries, while benefiting only a select few.<sup>37/</sup> In addition, capital funding costs for a national network appears unlikely in light of recent reductions in the federal budget. For these reasons an evolutionary approach towards a national network appears to be taking shape whereby enhanced interconnection is achieved through arrangements made by libraries at the local level in response to user needs.<sup>38/</sup>

As discussed elsewhere in this report, the extensive revenue sharing and coordination of collections development encouraged by the highly systemized operations of library networks raise serious concerns for copyright owners. Do such operations come within the scope of §108(g)'s prohibition against systematic copying, or do they fit within the ILL provisions of 108(g)(2)? The sheer volume of the copying and the highly organized manner in which the systems are organized should preclude the application of §108 to such systems. The potential commercial or economic damage to the market for copyrighted works so used may make it difficult to apply §107 to their operations.

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37. Malinconico, The National Bibliographic Network: A Patrician Pursuit, 105 Library Journal 1791, (September 15, 1980).

38. Network Advisory Committee Open Meeting - June 28, 1981, 41 Library of Congress Information Bulletin 39, (January 22, 1982)

#### 4. Special Libraries.

Special libraries are libraries other than public, school, federal, or academic libraries. They include libraries located in business corporations, trade associations, law firms, museums, hospitals, and other similar institutions.<sup>39/</sup> In 1981, it was estimated there were 8,571 special libraries in the United States.<sup>40/</sup>

Special libraries often have a different perspective from other libraries because their primary mission is advancing the specific goals of their sponsoring organization; nevertheless, they face many of the same problems. For these reasons, special librarians argue that many of the concerns of the library community regarding resource sharing equally are applicable to their libraries. As discussed elsewhere, the mission of SFP libraries -- the support of the for-profit entity in which they are housed -- makes them ineligible for most §108 privileges.<sup>41/</sup>

Networking has developed more slowly among special libraries than among others. PALINET reportedly was the first OCLC-affiliated network to accept an SFP library as a member.<sup>42/</sup> That action required a special ruling from the Internal Revenue Service to enable Bell Telephone Laboratories to join the network in 1976. Today, PALINET claims that 16 percent of its membership consists of special libraries.

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39. CONTU Final Report, p. 56 (1978).

40. American Library Directory (34th Ed. 1981).

41. See, text supra, III, A, 4.

42. Russell, Interlibrary Loan in a Network Environment, 73 Special Libraries 7, (January, 1982).

The Special Libraries Association (SLA) has been the most active special library organization. It is presently sponsoring a survey in conjunction with NCLIS to determine the extent of networking among special libraries.<sup>43/</sup> In addition, SLA has undertaken experiments in electronic mail to assist in transacting the association's administrative business.

#### B. Changes in Publishing

From a technical and systems standpoint, the publishing industry has not changed a great deal over the past three hundred years.<sup>44/</sup> The published journal, for example, is similar to the original scholarly journals published in the 1600's. The bedrock on which the publishing industry is presently built, however, is changing. These changes encompass both the manufacturing of textual material and the use of new electronic media of expression. Ultimately, these developments will forge new relationships among publishers, authors, librarians and users.

##### 1. Automation of the production and distribution of paper-based products

In the wealth of publicity about the information revolution, much attention has been focused on new electronic media; but new media are not the only significant developments. The application of computer technology to many traditional authorship and publishing functions has been of equal

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43. Griffin, The Bowker Annual of Library & Book Trade Information, p. 165 (1982).

44. King, Electronic Alternatives to Paper-Based Publishing in Science and Technology, in The Future of the Printed Word, 100 (1980).

importance. Automation is present "at the creation," through authors' use of word processors and text-editing systems,<sup>45/</sup> not only assisting the author, but greatly helping the publisher in producing the final product.

Publishers, whether or not they receive an author's manuscript in machine-readable form, have made extensive use of electronic processes for editing, redaction, and composition.<sup>46/</sup> In order to achieve maximum efficiency, the computer equipment of the publisher must be compatible with that of the typesetter. This entails making the coding structures, bit transfer speeds, protocols, font widths, and storage media compatible with one another.<sup>47/</sup> Much of this complexity, however, will be eliminated when software is developed to handle many of the compatibility problems.<sup>48/</sup>

New technology can also make production schedules more responsive to consumer demand. One development has been the introduction of nonimpact printers, allowing the publisher to print copies on demand.<sup>49/</sup>

Another application of computer technology in the book industry is the creation of an integrated electronic network for the transmission of orders for books.<sup>50/</sup> The primary group in this field is the Book Industry Standard Advisory Committee (BISAC), an organization with members from all

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45. Id. at 101.

46. Id.

47. Shotwell, Networking Is the Promise - and Problem - of Computers, 222 Publishers Weekly 26, (October 22, 1981).

48. Shotwell, Computer Typsetting - Reflections on a Revolution, 222 Publishers Weekly 92, (October 1, 1982).

49. Shotwell, Books on Demand, 219 Publishers Weekly 47, (February 13, 1981).

50. Doebler, The Computer in Book Distribution, 218 Publishers Weekly 36, (September 12, 1980).

segments of the book industry. The primary work of the Committee to date has been the development of industry standards for data interchange to insure compatibility of the computer systems which are utilized.

## 2. Electronic Publishing

The term "electronic publishing" describes an extremely broad spectrum of new media for publication, including videocassettes and discs, teletext and videotext, data bases, educational software, and electronic journals. While each of these media has unique characteristics, they all are fundamentally interactive: a videotext system could be used to deliver a data base or educational software; a data base could be used to deliver journal articles electronically. And, most importantly, their contents can be duplicated easily and inexpensively.

### (a) Videocassettes and videodiscs.

Sales of videocassette recorders and videodisc players have created new markets for old and new audiovisual materials. Today, the videocassette and videodisc market is largely dominated by feature films.<sup>51/</sup> It has been predicted, however, that once 6 to 7 million players have been sold domestically, the market will expand into a more specialized "home video" market in which new products, especially tailored to the media, are

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<sup>51</sup>. Dahlin, Electronic Publishing Steps Forward and Back, 221 Publishers Weekly 31, (June 4, 1982).



sold.<sup>52/</sup> Some commercial videocassettes and videodiscs have already been produced, and instructional material may be particularly adaptable to these media.<sup>53/</sup>

(b) Teletext and Videotext

Teletext and videotext systems provide electronic delivery of a variety of information to homes and businesses. Because both are in preliminary stages of development, their short-term commercial viability cannot be predicted. Teletext is a one way service transmitted via the vertical blanking interval of a television signal or the full channel of a television station or cable television system.<sup>54/</sup> Videotext is a two-way interactive system transmitted either by telephone or cable technology.<sup>55/</sup>

Numerous private sector experimental programs have been initiated exploring the commercial feasibility of teletext and videotext systems. In the United States alone, more than 20 broadcast licenses have been issued by the FCC for teletext experiments.<sup>56/</sup> It is expected that the initial development of teletext will be faster than videotext because teletext requires a smaller start up investment and, depending on advertiser support, it may be offered to the consumer at no additional cost.<sup>57/</sup> The future of videotext, on the other hand, may depend on the spread of home

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52. Dahlin, Consumer as Creator, 219 Publishers Weekly 22, (March 27, 1981).

53. Id.

54. Special Report - Teletext and Videotext, 102 Broadcasting 37, (June 28, 1982).

55. Id.

56. Id.

57. Id. 42.

computers, the willingness of computer owners to pay for videotext services, and the psychological acceptance of a non-print delivery system by educators, librarians, scholars and ordinary citizens.

In addition to questions of commercial viability, other technical factors, including the lack of industry standards governing hardware and the uncertain regulatory constraints which might be applied,<sup>58/</sup> have inhibited the rapid development of teletext and videotext systems.

(c) Data bases

Thus far, most publishers have participated in the growing data base field through the licensing of their works to one or more vendors of data base services. This increasingly common transaction is treated as the licensing of electronic rights and the extent to which revenue from exploitation of this new right will figure in the balance sheet of the typical publisher remains unclear. To take advantage of this new means of information dissemination, a publisher must have a property amenable to a data base format and the property must be in, or be capable of being put into, a machine-readable form. The lack of machine-readable text has inhibited many publishers from fully utilizing this emerging medium since the costs of conversion of conventional text to machine-readable forms remains high;<sup>59/</sup> as more works are written or edited in machine-readable media, this problem will be reduced.

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58. Neustadt, Skall, Hammer, The Regulation of Electronic Publishing, 33 Fed. Com. L. Jour. 331 (1981).

59. Shotwell, Getting into Database Publishing: Some Possibilities and Pitfalls, 222 Publishers Weekly 45, (September 11, 1981).

The growth of data base vending and the increasing importance of electronic rights will affect the traditional contractual relations between authors and publishers. Ironically, in some cases the existence of data bases may allow authors to dispense with conventional publishers entirely if vendors decide to accept unpublished manuscripts into the system. Authors would pay a fee for this service and receive a royalty every time the work is accessed by a user.<sup>60/</sup>

(d) Educational Software

During the 1960's, efforts to introduce computers into educational instruction largely proved a failure. Computers then available were too costly and the software needed was simply not available.<sup>61/</sup> Recently, some large educational publishers have renewed their efforts to produce innovative educational software (often referred to as courseware), and preliminary results appear to be positive even though many copyright questions involving computer usage and royalties are not entirely resolved.

Educational software has one significant advantage over other instructional media -- it is interactive, the student can progress at his or her own rate and the program can automatically evaluate performance.

(e) Electronic Journal Publishing

While, from time to time, it has been predicted that an electronic journal system rapidly would replace the traditional SST journal, few would offer predictions of such rapid change today. The present system

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60. Pocker, User Publishing: A New Concept in Electronic Access, 221 Publishers Weekly 38, (April 16, 1982).

61. Dahlin, Watch that Book, 219 Publishers Weekly 25, (March 20, 1981).

of subscription journal publishing has a long and successful history; the markets in which it exists may be somewhat resistant to change. In 1979, the United States alone published a total of 4,600 scientific and technical journals containing about 400,000 articles.<sup>62/</sup> Given the large number of publishers, contributors, scientists, librarians and users familiar with the present system, changes in the system may take place in a manner more evolutionary than revolutionary.

The long term trend in information growth and simple economics clearly favors a greater use of electronic media in the future. Few would argue that the present distribution system is as efficient as possible; it has been estimated that for every ten copies of an article which are distributed, only one gets read.<sup>63/</sup> Due to the rapidly changing manufacturing technology, moreover, more publishers obtain their contributors manuscripts in machine-readable form. Therefore, the costs of placing the contribution into an electronic delivery system would not be great. Finally, electronic delivery of journal articles offers the advantages of speed and ease to librarians and their patrons,<sup>64/</sup> while, as will be discussed, facilitating the resolution of some of the copyright problems.

To date, experience with electronic journal publishing has been limited. In the late 1970's, an experiment in electronic journal publishing was undertaken in Great Britain. Despite initial high expect-

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62. King, supra note 44, at 99.

63. Id. at 105.

64. Hickey, The Journal in the Year 2000, 56 Wilson Library Bulletin 258, (December, 1981).

tations, the experiment reportedly ended in failure. The high cost of the technology and the reluctance of academics to contribute to a project in which there was never a hard text caused its demise.<sup>65/</sup>

Recent efforts offer renewed hope for success. The British Library Research and Development Department has funded an experimental program in electronic network communication.<sup>66/</sup> Several publishers are developing systems that permit graphics and machine-readable information to be stored on a single videodisc.<sup>67/</sup> John Wiley & Sons has announced that a data base it publishes online will feature the Harvard Business Review.<sup>68/</sup> The American Chemical Society is experimenting with online availability of sixteen of its primary journals.<sup>69/</sup> Finally, a small communications company in New York City, Comtex Scientific Corporation, has announced that it will introduce a series of electronic journals which will be available only online.<sup>70/</sup>

The widespread electronic delivery of journal articles could help alleviate some of the copyright problems associated with photocopying. Since access and delivery of documents from a computer based system can be controlled and recorded, a mechanism for payment for copies delivered can be implemented. This potential has motivated a group of large publishers

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65. Campbell, Information Technology Year: Electronic Publishing, Chemistry and Industry 233, (April 3, 1982).

66. Id.

67. Marcum & Boss, Information Technology, 56 Wilson Library Bulletin 46, Sept. 1981, (1981).

68. Dahlin, supra note 52, at 27.

69. Lucker, Document Delivery and Research Libraries, p. 6, (Sept. 7, 1982) (unpublished).

70. Campbell, supra, note 65, at 233-34.

of SST journals to formulate a document delivery project called ADONIS.<sup>71/</sup> In this system, libraries and document delivery services will secure documents electronically from ADONIS, which in turn will pay participating publishers a user fee for each article printed. The Europeans originated the ADONIS concept, and the system is much further along in the planning stage there than in the United States.

Establishment of an electronic journal publishing system clearly raises some risks for publishers, contributors, and librarians. For publishers, the primary risk is that increased availability of journal articles online may reduce the number of subscriptions and cause the loss of advertising revenue. For the contributor, the concern is that publication restricted to an electronic medium may not be accorded the same recognition as hard copy publication. For the librarian, the concern is cost — will the library be able to afford receiving copies online? For these reasons, it is expected that electronic journals will develop somewhat more slowly than if the constraints were simply technological.

#### C. The Changing Operations of Libraries.

Within the last decade, libraries have undergone great changes. The growth of bibliographic utilities has computerized much library work and enhanced the interconnection among libraries. While these changes are significant, they appear to be only the beginning. Budgetary constraints and changing consumption patterns will continue the pressures on libraries to modify their operations.

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<sup>71.</sup> Id. at 234.

Rising costs of library services affects the full range of library responsibilities. Yale University, for example, has calculated that if present trends continue, its library would need a permanent staff of 6,000 in the year 2040 to cope with books and journals.<sup>72/</sup> The cost squeeze also is particularly acute in the acquisition of scholarly journals. One commentator has identified four major features of the journal problem:

(1) The escalating cost of periodical subscriptions at a rate considerably more accelerated than the Consumer Price Index; (2) an overall increase in the number of scholarly, scientific and technical journals published worldwide; (3) a lack of growth in library acquisition budgets that makes it difficult to keep up with inflation, much less with the increased output of information; (4) the difficulty in cancelling subscriptions to provide funds for new titles because older journals tend to cost less than new journals, requiring the cancellation of several titles to generate funds for one new title.<sup>73/</sup>

Leading librarians have predicted the collapse of the present system of scholarly publishing unless reforms are instituted. One authority summarized the situation in the following words:

Our entire structure of higher education and scholarly endeavor has been built upon a communication process for scholars subsidized by universities through their research libraries. But because of the changing economics in our society, we're now in a situation where our scholars generate information in the universities, give it away to publishers (or in some instances pay to have it published), and then our libraries buy it back at increasingly prohibitive cost. The system is no longer working for us - economic inflation has made publishers'

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72. Campbell, Publishing in the information age, 3943 The Bookseller 189, (July 18, 1981).

73. Lucker, Electronic Journal Publishing and Libraries, Prepared for Oct. 14, 1982 meeting of the Association of Research Libraries, p. 1-2 (September 1982).

costs too high - the result being cancellations and reduction in purchases by libraries and, ultimately, the lack of availability of needed material for scholars.<sup>74/</sup>

On the other side of the coin, the emerging electronic media of expression are changing basic patterns of consumption. This has led some to question whether libraries will have a significant role to play in the future. Maurice Line, of the British Library Lending Division, posed the following questions facing libraries today.

Where might libraries fit into future society? The need for current recreational reading will be supplied (as now) largely by disposable paperbacks. Needs for publications of the past will be capable of being met directly by on-demand printing from a machine-held database, or possibly from microform. Reference needs, fulfilled at present largely by directories, handbooks, encyclopedias, etc., will be met online, probably through television screens. Research needs will be satisfied largely through commercial database operators, selling printouts or computer time. Libraries are intermediaries in the communication of information, at best transmitters: if intermediaries are less needed, and transmission is done in other ways, where do libraries come in? Should libraries wait and see how things develop and then see what they can do about it? Should they try to influence matters at an early stage - if so, how, and is it already too late? Should libraries become producers, as well as intermediaries? Should patrons be charged? All or some? If some, where should the line be drawn? The questions are agreed, but no one knows the answers.<sup>75/</sup>

In order to examine future trends impacting upon libraries, this portion of the paper will separately discuss document delivery, storage and preservation, and the modified role of libraries in the future.

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74. Battin, Libraries, Computers, and Scholarship, 56 Wilson Library Bulletin 581, (April, 1982).

75. Line, Libraries and Information Services in a Post-Technological Society, 252 Jour. Lib. Automation 263-64, (December 1981)



# 1. Document Delivery

While great strides have been made in automating reference searching, securing the desired documents often is troublesome. Today, documents secured through a library are generally obtained through either the borrowing of a copy or photocopying. According to the KR, nearly 25 million ILL requests were made in 1981.<sup>76/</sup> Of these requests, more than 10 million were filled with originals, and roughly 7 million were filled with photocopies.<sup>77/</sup> Of the portion filled with photocopies, 94% were of serials.<sup>78/</sup>

The studies which have been made of the costs of delivering a photocopy through ILL, even with no copyright royalty, indicate that the process is relatively expensive. One study at MIT estimated the cost of borrowing at \$10.69, and the cost of lending at \$6.23.<sup>79/</sup> Another study showed that the lending library's cost to fill an ILL request (\$5.45) was insignificantly different from the cost of processing a request that could not be filled (\$5.40).<sup>80/</sup> Increasingly, alternatives to the present ILL system are being sought. One option is to obtain documents through automated document order services provided by commercial data base vendors. Costs for obtaining documents through these systems appear to be higher than for traditional interlibrary loan, but not exceedingly so. For

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76. KRT 3.3.(a).

77. Id.

78. KRT 3.6.

79. Ferriero, Impact of OCLC on Interlibrary Loan at MIT, 3 Research Libraries in OCLC: A Quarterly 3, (July, 1981).

80. Herstand, Interlibrary Loan Cost Study and Comparison, 20 RQ 249 (1981).

instance, Lockheed's Dialorder service in 1979 had a cost of approximately \$.25 per page exclusive of basic system user charges. After both direct and indirect charges (including payment of copyright royalties) are added, the typical 10 page article is estimated to cost about \$20.<sup>81/</sup>

Securing copies through a commercial data base vendor removes some of the copyright problems associated with photocopies secured through ILL or local copying. Since the data base vendor charges fees in accordance with use, copyright royalties can be provided for copies of works which are made. So long as the system involves the delivery of paper copies, controls over further copying will be governed by the copyright law alone. The copyright situation may become more complicated in the future, however, when documents themselves are delivered electronically and when terminals with online storage capacity, printers, local networks, and electronic mail systems become widespread. These systems can short circuit a charge per-use system because they have the capacity to retain local electronic copies of material taken from a data base or other information source. Once locally stored, the user would have the ability to print innumerable copies or transmit the work to other computer terminals.

Another method of document delivery is telefacsimilie transmission. This type of system sends an image of printed, written or graphic material by converting the visual pattern of the printed page into electrical signals. The signals are transmitted to a telecommunications point where they are decoded to form a replica of the original.<sup>82/</sup>

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<sup>81.</sup> Simpson, The Economics of Document Delivery, prepared for the October 14, 1982, Meeting of the Association of Research Libraries, p.6, unpublished, 1982.

<sup>82.</sup> Marcum and Boss, Information Technology, 56 Wilson Library Bulletin 206, (November, 1981).

The experience of the library community with telefacsimilie generally is limited to equipment using an analog rather than a digital process. These machines are expensive,<sup>83/</sup> take four to six minutes to transmit a single page, and produce copy often with poor image resolution.<sup>84/</sup> Newer machines recently have been introduced using a digital transmission process which can transmit a page in fifteen to sixty seconds and produce copies of higher resolution than analog machines.

In copyright terms the use of telefacsimilie can be analogized to the mailing of photocopies.<sup>85/</sup> However, because of the high cost of telefacsimilie, a significant number of copies must be transmitted in order for the technology to be cost effective. Transmission of copies on such a large scale would increase the likelihood that the copying would be found to be "systematic" under §108(g)(2).

Electronic mail will be a method for high-speed document delivery in the future. Today, electronic mail rapidly can transmit messages between two or more computer terminals connected by telephone lines, satellites, or microwave stations.<sup>86/</sup> This technology is not now widely used because relatively few articles are available in machine-readable form. As more machine-readable information is available, it increasingly

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83. Id.

84. Boss and McQueen, Interlibrary Document Delivery: the Options, Derived from a report prepared by Information Systems Consultants Inc., for the Western Council of State Libraries, III (unpublished 1982).

85. Martyn, UAP and the new information technologies, III Unesco Journal of Information Science, Librarianship and Archives Administration 40 (1982).

86. Marcum and Boss, Information Technology, 56 Wilson Library Bulletin 602, (April 1982).

will be used. Research libraries already have studied the possibility of developing an electronic document scanning and transmission system for interlibrary document delivery.<sup>87/</sup>

The potential copyright problems associated with electronic transfer of documents are obvious. In cases where machine-readable copies of documents are secured from a publisher, presumably an explicit license would be executed or understanding would arise as to the ownership of the transmission rights.<sup>88/</sup> Such electronic storage and transmission of copyrighted property is governed by the exclusive rights set forth in §106 and falls outside of the "single copy" reproduction right generally permitted for photocopy transactions in §108(a).

## 2. Storage and Preservation

Librarians long have struggled with storage and preservation problems. While the ever-increasing size of collections has required large investments in physical plants to provide the necessary shelf space, the paper typically used by book printers has limited the shelf life of most books to thirty to fifty years.<sup>89/</sup> The development of new information technologies offers an array of possible solutions to both of these problems.

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87. As reported, the proposal was prepared at the Massachusetts Institute of Technology jointly by the Laboratory for Information and Decision Systems and various research libraries. See Lucker, supra note 69, at 6.

88. Obviously, a main selling point for marketing material in machine-readable form is the ease in which such material can be transmitted.

89. Battin, supra note 74, at 582.

Computer systems offer great — and increasing — capacity for information storage. Of the variety of storage technologies available today, videodisc and optical disc offer libraries substantial possibilities for storing both print and nonprint materials.<sup>90/</sup> Videodisc has great potential as a low-cost storage medium for motion pictures, recordings, photographs, and other graphic materials. Optical disc, through digitally encoding of print material, has the capacity of storing many volumes of books on a single disc.

Currently, both the NLM and the Library of Congress are conducting projects examining the application of video and optical disc technologies to the preservation and use of library materials. The optical disc system which is contemplated will consist of three component subsystems: an input scanning and keyboard entry subsystem; an optical disc recording and playback subsystem; and an output system consisting of high resolution CRT terminal displays, medium resolution terminal printers, and high resolution batch printers. In addition to assisting in the storage of portions of its collections, it is contemplated the optical disc technology will assist in on-demand printing of the Library's catalog cards.<sup>91/</sup>

Videodisc and optical disc storage of library materials offer to libraries several advantages over conventional storage of hard copy. The first obvious advantages are the saving on shelf space and the potential for long-term preservation. The abilities to reproduce inexpensively one optical disc from another optical disc, to reproduce hard copy from the disc, and to transmit the contents of an optical disc to distant points for

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90. Marcum and Boss, supra note 86, at 45.

91. News from The Library of Congress, PR 82-68, Aug. 13, 1982 (1982).

display or further reproduction, offer libraries real possibilities for improved user service; but they also present serious copyright problems that, unless resolved, may impede the development of this technology.

The utilization of computer or optical disc systems by libraries for preservation purposes was not specifically addressed by the drafters of the 1976 Copyright Act. Only two provisions of the Act deal even indirectly with preservation at all.<sup>92</sup> Subsection 108(c) authorizes reproduction of published material "solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, if the library or archives, has, after reasonable effort, determined that an unused replacement cannot be obtained at a fair price."<sup>93</sup> Subsection 108(b) deals specifically with the reproduction of unpublished works in facsimile form for preservation purposes. The limited nature of these provisions and the statement in the legislative history that 108(b) would not be applicable to reproduction of the work "in 'machine-readable' language for storage in an information system"<sup>94</sup> raise questions about the legal status of the conversion under §108 of copyrighted material into computer media solely for the sake of convenience. The use of such media to transmit copyrighted material to distant points is clearly outside the present bounds of §108, and, generally, requires the permission of the copyright owner.

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92. Sec. 113 of the Transitional and Supplementary Provisions provides for the archival reproduction of certain television and radio programming by the Library of Congress for inclusion in the American Radio and Television Archive.

93. See, text supra, IV A.

94. H.R. Rep. No. 1476 at 75.

### 3. Modified role of libraries in the future.

Due to the rising costs of providing library services and the changing patterns of distribution of works protected by copyright, questions should be raised over what role libraries will play in the future. Already, some have predicted that the library may be bypassed and that public libraries may be only temporary phenomena.<sup>95/</sup>

While current circumstances raise many challenges to the library community, they also present corresponding opportunities. In the past, public libraries were largely a circulator of books. The new communications media will allow libraries to integrate their operations with the community in ways never before possible. The development of community data bases by libraries on diverse topics, including clubs, government agencies, adult education, day care centers, career opportunities, and the like may become commonplace.<sup>96/</sup> The utilization of cable television systems may provide opportunities for libraries to inform patrons of available holdings and services.<sup>97/</sup> Advances in fiber optics may permit libraries to offer home services to housebound users.<sup>98/</sup> There also may be a role for libraries to play in providing community conferencing and message

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95. Dowlin, The Electronic Eclectic Library, p. 2265, (Nov. 1, 1980).

96. Id. at 2267.

97. In Lexington, Kentucky, for example, the operator of the local cable franchise agreed to provide home subscribers with an online catalog of the holdings of the Lexington public library. See, New Technology, 105 Library Journal 2508, (December 1, 1979).

98. Rice, Fiber Optics A Bright Information Future, Library Journal, 1137 (May 15, 1980).

center programs.<sup>99/</sup> Finally, for those who cannot afford home computers or terminals, libraries may become points of access to important electronic resources.<sup>100/</sup>

#### D. Conclusion

Often the controversy between librarians and publishers over copyright is lamented on the grounds that both parties need each other: without the books and periodicals provided by publishers, libraries would lose their stock-in-trade; without a viable library market, many publishers would find it difficult to stay in business. Despite this close symbiotic relationship, the two professions agree upon little concerning library photocopying.

The introduction of new technology will raise the cost of discord between librarians and publishers. In order to receive benefits achievable through new technology, significant capital and developmental expenses must be incurred. This investment could never be justified in an environment in which controversies over property rights remain unsettled.

This chapter has identified and discussed some of the salient features of the new information technologies and pointed out some of the policy implications arising from their application to the creation, dissemination and use of works protected by copyright. It cannot address in detail all of the implications, but it does point out those with the potential for copyright problems more vexing than the present photocopy issues.

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99. Dowlin, supra note 95, at 2266.

100. Id. at 2269.



The key to understanding the present technology-related copyright issues lies in the recognition that the problem presented is essentially the loss by the copyright proprietor of control over the economically efficient making of copies of protected works. That is the central issue in photocopying; it is the same with respect to the new information technologies. The technological developments highlighted here only indicate that part of the iceberg that is above the technology surface — what is presently hidden from view will undoubtedly present complexities and policy issues that make the difficult photocopy issues seem simple. The work of CONTU in dealing with a few specific information technology issues and the problems encountered by the Congress in dealing with other high-technology issues has demonstrated the difficulty of resolving such issues through the relatively time-consuming legislative process. Furthermore, the judicial process, which must focus on the issues of particular litigants in particular cases, may be unable to achieve timely, broad-based solutions to the problems resulting from technological innovation. Both highlight the desirability of resolving many of these problems by the parties through voluntary, consensual agreements or guidelines. There is great promise here for continuation of that process.

The present copyright law does not exempt computer uses of copyrighted works from the rights set forth in §106 except in respect of the limited incursions on the exclusive rights of owners of copyright in computer programs set forth in §117. There is no general §108-like exemption applicable to computer uses of copyrighted works. Thus, the use of protected works in new technology based systems has copyright consequences. The exact scope of copyright liability, and the applicability of fair use, is not clearly understood. But, this much is clear: in developing systems

to serve the goal of the wide dissemination of information, we cannot continue to dilute endlessly the exclusive rights of copyright owners and the incentive to creativity that they provide.

The fundamental function of copyright is to encourage both creativity and dissemination. In the electronic networks of the future, governed in many cases by contractual provisions among proprietors, system operators, and users, copyright can and should serve these goals. True, copyright provides strong protection for copyright owners but that protection is balanced by limitations on the scope of copyright intended to make the fundamental information embodied in protected works available to the public.

The bottom line in the new technologies is this: users, librarians, publishers, and authors must devote serious attention to how they can cooperate to make the system work in light of the potential benefits afforded by the new technologies and the realities of our incentive-oriented system of information creation and dissemination. Striking such a balance is difficult, as the rest of this report addressing the photocopy issue points out. But, as is also shown, balance is attainable. It can be done, and the parties must come together, perhaps within the ambit of the next five-year review or under the auspices of a new CONTU-like body as suggested at the Anaheim hearings.<sup>101/</sup>

While past disputes clearly indicate that agreement between librarians and publishers about copyright disputes is difficult to obtain, one factor, at least, favors accommodation. That is the relative inefficiency and high cost of the present system. Studies indicate that the cost of a typical interlibrary transaction today approaches \$20. Working

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101. Anaheim Hearing at 19 (Statement of William Koch).

together, librarians and publishers should be able to devise a system utilizing new technology which is faster, more efficient, less expensive, and which still provides a copyright payment. Failure to work towards this goal will ensure difficulties for both librarians and publishers in adjusting to the new realities thrust upon them by technological advances.



VII. LIBRARY REPRODUCTION ABROAD:  
AN OVERVIEW OF RECENT DEVELOPMENTS

A. Efforts at the International Level - In General

International copyright relations of the United States are governed for the most part by the Universal Copyright Convention.<sup>1/</sup> This treaty came into place as a result of efforts made following World War II to bridge the gap that then existed between a system of treaties among countries in the Western Hemisphere<sup>2/</sup> and the network of agreements that linked the countries of Europe in a system called the Berne Union.<sup>3/</sup>

Both the Universal Copyright Convention and the Berne Convention for the Protection of Literary and Artistic Works are based on what is known as the principle of national treatment: generally, a State party to a convention undertakes to protect works of nationals of any other State member of the same agreement, or works first published in that State, at least to the same extent it protects works of its own nationals.<sup>4/</sup> In

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1. The Universal Copyright Convention was signed at Geneva in September 1952, and entered into force for the United States on December 6, 1954. See Universal Copyright Convention, 6 U.S.T. 2731, T.I.A.S. 3324 (1955). The Convention was revised at Paris on 24 July 1971. See 25 U.S.T. 1341, T.I.A.S. 7868 (1974).
  2. For texts of interamerican copyright conventions, see General Secretariat, Organization of American States, Copyright Protection in the Americas, Part 3(A) (1980).
  3. See Berne Copyright Union: Items A through H, Copyright Laws and Treaties of the World (Unesco & BNA) (1982) [hereinafter cited as CLTW].
  4. See Universal Copyright Convention, supra note 1, Art. II, 25 U.S.T., at 1345; see also World Intellectual Property Organization, Guide to the Berne Convention, Art. 5, at 32 (1978). For an interesting discussion of the principle of national treatment, see E. Steup, The Rule of National Treatment for Foreigners and its Application to new Benefits for Authors, 25 Bull. Copr. Soc'y 279, Item 264 (1978).

addition to the specific protection accorded under their domestic laws, Berne member States are also obligated to provide for any rights specially granted in the text of the instrument to which they are bound. Both Conventions ensure a minimum level of protection which may be exceeded, but not lowered, by national laws.

Until recent years, neither the Berne Convention nor the Universal Copyright Convention provided expressly for what is usually considered a fundamental right of authors and other owners of copyright, that is, the right to control the reproduction of protected works. While the domestic laws of both Berne and UCC States invariably recognized the reproduction right, a specific right of reproduction was first added to the Berne Convention at Stockholm in 1967 and carried forward in the latest revision of the Convention in 1971.<sup>5/</sup> At the time this right was acknowledged, it was also decided that members of the Berne Union could permit the reproduction of copyrighted works "in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."<sup>6/</sup> When the Universal Copyright Convention was revised in July 1971, the exclusive right of an author "to authorize reproduction by any means" was also specifically acknowledged; however, States were permitted, in their domestic laws, to make exceptions to this right

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5. Paris Act, 1971, Art. 9(1), Berne Copyright Union: Item H-1, CLTW (1982).

6. Id. Art. 9(2). For commentary on this provision, see Report on the Work of Main Committee I, para. 85, Records of the Intellectual Property Conference of Stockholm, vol. II, at 1145 (1971). Similar language was included in the recently adopted Arab Copyright Convention with respect to photocopying by public libraries, non-commercial documentation centers, educational institutes and scientific and cultural institutions. See Arab Copyright Convention, Art. 12, reprinted in 16 Unesco Copyright Bull. 82, 83 (1982).

that did not conflict with the spirit and provisions of the Convention. Moreover, they were required in all cases to assure a reasonable degree of effective protection for the right to which exception was made.<sup>7/</sup>

Neither Convention has made express provision for a general right to control the distribution of works protected by copyright. The Berne Convention mentions this right in connection with cinematographic works, and the Universal Copyright Convention accords an exclusive right (for a term of years) to publish a translation. Further, many countries do not grant such a separate exclusive right in their domestic copyright laws.<sup>8/</sup> In certain cases, however, the right of reproduction may be interpreted to cover a right of distribution. This point was discussed by the Secretariat of Unesco and the International Bureau of WIPO when preparing the Commentary on the Tunis Model Law on Copyright for Developing Countries:

The authors of the Model Law did not mention the right of distribution, regarding it as implicit in that of reproduction; the author, when making a contract for reproduction of his work, has the power to define the terms and conditions for the distribution of the copies with regard to quantity, price, geographical area of authorized distribution, etc. The national legislator may, however, include this right expressly in the law in order that it may be exercised separately, and this may well have advantages for the author, especially since new technologies have appeared for the distribution of works (cable television, etc.). This would be true, for instance, of an author who authorized a publisher to reproduce his work but did not wish to distribute it under a given set of circumstances or in a given country.<sup>9/</sup>

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7. Universal Copyright Convention, supra note 1, Art. IVbis, 25 U.S.T., at 1349.

8. See Franklin Institute GmbH Munich, Problems of Document Delivery for the EURONET User, at 109 (1979) [hereinafter cited as Franklin Report].

9. Tunis Model Law on Copyright for Developing Countries, Commentary on section 4, Copyright 165, 168 (1976).

The impact of the new methods of reproducing protected works has been a focal point at several meetings of the Committees established to oversee the development and application of the two major international copyright conventions.<sup>10/</sup> A Working Group met at Paris in 1973 to consider the adequacy of the conventional obligations in view of the rapid growth in the installation and use of reprographic equipment and the progressive reduction in the unit costs of copies made on such equipment.<sup>11/</sup> The Working Group was of the opinion that, in principle, reproduction by reprographic processes is a form of reproduction recognized as an exclusive right of the author under both the Berne and Universal Conventions. It recommended, as a general rule, that the legitimate interests of authors require that domestic laws make provision for the payment of a fair remuneration for the reprographic reproduction of protected works.<sup>12/</sup>

The reprographic reproduction of works protected by copyright was again considered at the international level by Subcommittees of the Intergovernmental Copyright Committee and the Executive Committee of the Berne Union at a meeting held at Washington, D. C. in June 1975. This gathering of copyright experts reviewed developments in several countries, including systems that had been adopted in Sweden and the Federal Republic

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10. The Intergovernmental Copyright Committee was established to administer the Universal Copyright Convention; the Executive Committee of the Berne Union follows the development of the Berne Convention for the Protection of Literary and Artistic Works.
  11. The Working Group on Reprographic Reproduction of Works Protected by Copyright met at Unesco Headquarters in Paris, from May 2 to 4, 1973, under the joint auspices of the United Nations Educational, Scientific and Cultural Organization [Unesco] and the World Intellectual Property Organization [WIPO].
  12. Report of Working Group on Reprographic Reproduction, Annex A, Recommendations, reprinted in Copyright 172, 179 (1973).



of Germany to control the replication of copies of protected works.<sup>13/</sup> Consideration was also given to the special problems of developing countries.<sup>14/</sup> Aware of the threat posed by the new technology to the exercise of the author's exclusive right of reproduction, the meeting invited States to consider, among other measures, "encouraging the establishment of collective systems to exercise and administer the right to remuneration."<sup>15/</sup> Although the Subcommittees reaffirmed the application of the provisions of the Berne and Universal Conventions insofar as the right of reproduction was concerned, they found that, since the problem did not arise in the same way for all countries, "a uniform solution on the international level cannot, for the time being, be found."<sup>16/</sup>

A similar note of caution was expressed in a report prepared for the Organization for Economic Co-Operation and Development [OECD]. Addressing the difficult copyright issues raised in the context of electronic data processing, it was urged that a flexible approach be followed when considering the enactment of uniform international standards

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13. See Report of Subcommittee of the Intergovernmental Copyright Committee and the Subcommittee of the Executive Committee of the Berne Union on the Reprographic Reproduction of Works Protected by Copyright, reprinted in Copyright 159 (1975).
  14. The delegation of Mexico informed the Subcommittees that the developing countries represented at the meetings had unanimously adopted a declaration on their special needs. In this statement, the developing countries generally reserved their position on reprography while expressing their concern that any solutions adopted by developed countries not raise "the prices already paid by the developing countries for the use of reprographic reproduction and not hamper the universal dissemination of works protected by copyright." Id. Copyright.
  15. Id. Annex, Resolution Adopted by the Subcommittees, Copyright, at 175.
  16. Id.; see also E. Ulmer, Automatic and, In Particular, Computerized Information and Documentation Systems and the Copyright Law, para. 27, reprinted in Copyright 239, 246 (1975).

with respect to property rights in data.<sup>17/</sup> It was hoped that, "over the coming decades, common experience and sharing of views will lead to a certain convergence of practice in OECD countries regarding intellectual property."<sup>18/</sup> Apart from a brief discussion of copyright in a recent study on the legal issues related to transborder data flows and data network policies,<sup>19/</sup> no further action has been taken by the OCED concerning this matter.

Such a wait-and-see attitude is not shared by all intergovernmental organizations called upon to grapple with reproduction and distribution of protected works in light of new technological advances. The Commission of the European Communities has considered the use of photocopiers and microcopiers in libraries, schools, universities, research institutes, documentation centers and similar organizations, and the need to balance the interests of users and the right of authors and publishers to an equitable remuneration. After a series of consultations with the industries concerned, the Commission suggested that, "[a]s regards the reproduction of the written word, sounds and images, a sum ought to be included in the selling price of equipment (photocopiers, tape-recorders, video recorders) and the material they use (photocopy papers, tapes) to

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17. I. de Sola Pool and R.J. Solomon, Massachusetts Institute of Technology, Transborder Data Flows: Requirements for International Co-Operation, at 65 (report prepared for OECD, July 1978).

18. Id. at 66.

19. See J. Bing, P. Forsberg and E. Nygaard, Norwegian Research Center for Computers and Law, Legal Issues Related to Transborder Data Flows and Data Network Policies, Organization for Economic Co-Operation and Development, DSTI/ICCP/81.9 (3d draft, May 1981).

guarantee the remuneration which authors, publishers, and performers are entitled to expect (and must not be denied); it could be based on a percentage of the retail price."<sup>20/</sup>

In recent years, the Commission of the European Communities has also been involved in deliberations concerning the role of copyright in the replication and transmittal of the full text of a document in electronic form. It has been observed that, in the not-too-distant future, it may be more economically feasible to deliver a copy of a work via a computer network than to continue the now common practice of sending photocopies in the mail.<sup>21/</sup> Networks are already in place for access to certain data bases in Europe.<sup>22/</sup>

As part of its exploration of the copyright aspects of document delivery over a telecommunications network called EURONET, the Commission of the European Communities commissioned an important technical report from the Franklin Institute. The report was completed in March 1979.<sup>23/</sup> After a

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20. Problems common to copyright and certain related rights, Community action in the cultural sector, Commission of the European Communities, Bull. of the European Communities, Supp. 6/77, at 13 (1978); see also E. Schulze, Reproduction Right of Authors of Literary and Artistic Works in Case of Reproductions for Personal Use, Copyright 217, 218 (1982).

21. See generally Commission of the European Communities, The Impact of New Technologies on Publishing (proceedings of the symposium held in Luxembourg, Nov. 6-7, 1979); and A. Norman, A. D. Little, Electronic Document Delivery (study prepared for the Commission of European Communities, 1981).

22. For example, "[t]he Euronet Diane network was officially inaugurated at the European Parliament on 13 February. More than 1,000 organizations currently use the network's 120 data bases." Fourteenth General Report on the Activities of the European Communities in 1980, para. 531, at 226. Euronet/DIANE, the Direct Information Access Network for Europe, provides access to databases containing data in electronic form either of a factual nature or, in most cases, bibliographic references.

23. Franklin Report, supra note 8.

detailed review of the domestic copyright laws of the respective countries, the authors of the report noted that "[h]armonisation of the law throughout Europe to remove anomalies in national and international practice would be a difficult and lengthy process."<sup>24/</sup> Therefore, they suggested that, at least in its initial phase of network operation, EURONET ensure, on the basis of a Memorandum of Understanding between the Commission, host organizations, document fulfillment centers and representatives of copyright owners, that a fair remuneration be paid for each document delivered through use of the EURONET document ordering system.<sup>25/</sup>

The proposals in the Franklin Institute report proved controversial. After consultation with representatives of publishers and librarians, the only point on which all parties could agree was the need "to collect more factual information on document delivery practices and their implications in order to establish a better platform for a second round of discussions."<sup>26/</sup> The impact of new publishing technologies on copyright was also singled out as an important topic for further discussion at a symposium organized by the Commission of the European Communities in November 1979. <sup>27/</sup>

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24. Id. at XIII.

25. Id. sec. 5.1.1, at 179.

26. C. Vernimb, Document Delivery--The Commission's Involvement, Electronic Document Delivery--II, at 13 (proceedings of a workshop and exhibition organized by the Commission of the European Communities, Directorate-General Information Market and Innovation, Luxembourg, 18-19 December 1980).

27. See L. Gerlach: Issue file, Issue No. 11: Legal Implications of New Publishing Technologies, The Impact of New Technologies on Publishing, supra note 21, at 158.

Faced with the growing need to develop more effective mechanisms to deal with the reproduction and distribution of their works, authors and other copyright owners have banded together in an effort to come to grips with the burgeoning technology. Although a right to authorize the reproduction of their works is recognized in the international copyright conventions and in many domestic laws, copyright owners have experienced considerable difficulties in enforcing this exclusive right.<sup>28/</sup> Drawing from the example of performing rights societies in the field of music, copyright owners in several countries surveyed have established new collecting societies to administer their rights.

Although the legal systems within which such societies operate vary widely, there is a common interest on the part of most copyright owners to coordinate these efforts in order that the schemes may function more efficiently, not just on a domestic basis but at the international level as well. In this respect, a Working Group on Copyright Collecting Societies has been formed under the auspices of the International Publishers Association and the International Group of Scientific, Technical and Medical Publishers. They have met on several occasions to compare developments in different countries and to discuss improved methods of collecting and distributing copyright royalties.<sup>29/</sup>

There have also been certain initiatives taken by several European publishers that are designed to respond to present library photocopying practices and deal with potential infringement problems raised by

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28. See generally G. Kolle, Reprography and Copyright Law: A Comparative Law Study Concerning the Role of Copyright Law in the Age of Information, 6 IIC 382 (1975).

29. See, e.g., Report to the 5th Meeting of the IPA/STM Working Group on Copyright Collecting Societies (October 1982).

electronic document delivery. A consortium of publishers, including Elsevier Science Publishers, Pergamon Press and Springer Verlag, have decided to establish an automated document fulfillment service named ADONIS. They intend to use advanced technology to store and retrieve individual articles or pages from scientific, technical and medical literature as part of a global service.<sup>30/</sup> The Board of the ADONIS Consortium has announced that it plans to be operational during 1984 and that publishers and major library/document fulfillment centers will be approached to participate in the project.

While representatives of publishers and authors struggle to create more effective mechanisms to deal with the reproduction and dissemination of protected works, certain library groups have urged the development of a more precise notion of fair use. In this respect, the International Federation of Library Associations [IFLA] has asserted "that the libraries should be able, on a non-profit basis, to reproduce copyrighted works for teaching, scholarship and research. To this end, IFLA feels that a controllable system and a very careful definition of fair use must be created."<sup>31/</sup>

A similar suggestion was made in connection with the development of a world science information system, UNISIST. In an early feasibility study on the establishment of the UNISIST program, it was recommended that the national scientific information agencies concerned "should stimulate revisions of national copyright laws in order to better conciliate public

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30. ADONIS (preliminary draft of proposed electronic document delivery project, June 1982). According to a press release dated October 4, 1982, the Board of the ADONIS Consortium has decided to proceed with the development of a document delivery system.

31. Franklin Report, supra note 8, at 15.

interests in document availability with individual motivations for legal protection, and ultimately evolve an international 'doctrine of fair use' in this area."<sup>32/</sup>

This interest in the preparation of an internationally acceptable fair use standard has not been well received by publishers and authors. In its comments to the Director-General of Unesco, ten years after the UNISIST feasibility study, the International Group of Scientific, Technical and Medical Publishers has urged "that Unesco should not only be active 'in promoting the dissemination of knowledge, but also in finding a solution for the imminent breakdown of the present scientific communication system', particularly in regard to the copyright 'erosion' by allowing practically everybody to reproduce practically anything without compensation (the 'fair use' or 'private use' loopholes)."<sup>33/</sup>

#### B. Proposals under Consideration

In many countries the copyright issues raised by the new reprographic technology are now under discussion. For the most part, efforts have centered on attempts to develop collective arrangements between copyright owners and users of protected works. Although concern is expressed over the widespread disregard of the exclusive right of

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32. Unesco, Synopsis of the feasibility study on a World Science Information System, Recommendation 19: Administrative barriers, at 64 (1971); cf. Unesco, Draft Medium-Term Plan (1984-1989), 2d pt., ch. VII, Information systems and access to knowledge, Programme VII.1, 4 XC/4, Unesco Gen. Conf., 4th Extra. Sess. (Paris 1982).

33. See International Group of Scientific, Technical and Medical Publishers, The Scientific Publishers' Position on the Issue of Copyright and other Legal and Administrative Issues related to Universal Availability of Publications, Paper IV, para. 9, Background Doc. No. 2, Contributions on Copyright, International Congress on Universal Availability of Publications (Paris, 1982).

reproduction, there is a growing realization of the need to establish a more effective legal framework to control the use of copyright works by libraries, document fulfillment centers, archives and similar organizations. This is especially true in legal systems providing for a general "private use" or "fair dealing" limitation. There is a marked tendency in certain instances for the concept of an exclusive right to give way to a mere right to remuneration.<sup>34/</sup>

#### 1. Canada

In recent years, studies on the reproduction of protected works in Canada have focused on two major points: "first, revision of the law, accompanied by special provisions relative to reprography; second, the conclusion of agreements whose purpose would be to indemnify authors or publishers."<sup>35/</sup> Particular attention has been paid to the need for a mechanism to collect and distribute royalties.

Although an owner of copyright under the Canadian copyright law has the sole right to produce or reproduce a protected work or any substantial part thereof in any material form, this right is subject to several limitations, the most important being the fair dealing exception in section 17(2) of the law.<sup>36/</sup> Since the law does not set specific parameters within which a user may freely copy, this provision has been critically evaluated in light of recent photocopying practices.

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34. See A. Dietz, Copyright Law in the European Community, at 78 (1978); see also G. Koumantos, The reproduction right and the evolution of technique, 98 RIDA 2 (1978).

35. V. Nabhan, Reprography and copyright in Canada, 99 RIDA 2, 20 (1979).

36. Copyright Statute of Canada, §§ 3 and 17(2), Canada: Item 1, CLTW (1982).



In reporting on the concept of "fair dealing" in the copyright law, the Canadian Economic Council noted that "an unreasonable burden is being thrown on the consciences and amateur legal expertise of such people as librarians and copying-machine operators," and recommended "the possible clarification of the 'fair dealing' provisions" to deal with the photocopying problem.<sup>37/</sup> This suggestion was questioned in a report prepared for use by the Canadian Government by A.A. Keyes and C. Brunet. They did not think the scope of fair dealing was susceptible of definition and proposed that "the present law of fair dealing should be left unchanged, and at the discretion of the courts."<sup>38/</sup>

Although some studies have taken a generally negative attitude toward reform of the provisions on fair dealing, there has been strong support for establishing some type of collective arrangement to administer the collection and distribution of copyright royalties for the photocopying of protected works. This policy goal was clearly stated in a recent report:

Photocopies are only one form of reproduction. Just as they negotiate agreements to determine the conditions under which their work will be used according to traditional methods of reproduction, authors and copyright holders should be able to exercise the same prerogatives when reproduction is performed in new ways (reprography). In this case, given the size of the user public and the phenomenal quantity of works used, the most practical solution would be the establishment of collective agreements providing comprehensive authorization for the use of works.<sup>39/</sup>

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37. Economic Council of Canada, Report on Intellectual and Industrial Property (1971), quoted in, A.A. Keyes and C. Brunet, Copyright in Canada--Proposals for a Revision of the Law, at 148 (1977).

38. Id. A.A. Keyes and C. Brunet, at 149; but see V. Nabhan, supra note 35.

39. D. N. Magnusson and V. Nabhan, Exemptions under the Canadian Copyright Act, at 48 (1981), quoted in, D.A. Smith, Collective Agencies for the Administration of Copyright, at 49 (draft: Jan. 1982).

A different conclusion was reached in at least one report on the subject. Considering the impact of reprography on the copyright system in Canada, S.J. Liebowitz proposed the extension of the existing system of price discrimination under which libraries pay more for journal subscriptions than private individuals.<sup>40/</sup>

## 2. United Kingdom

The copyright law in the United Kingdom also provides an exception from protection accorded to literary, dramatic and musical works for "fair dealing" with such works "for purposes of research or private study."<sup>41/</sup> It differs from the Canadian law, however, in that an attempt has been made to construe narrowly cases where libraries and archives may make or supply a copy of all or part of a protected work without the copyright owner's permission. There is a provision in section 7 of the Copyright Act of 1956 that permits specific non-profit libraries under certain circumstances to make or supply single copies of articles in periodical publications, copies of portions of published works and copies of entire works for other libraries.<sup>42/</sup> Under the regulations implementing section 7, a librarian may not provide a copy in specific cases unless the person receiving it has delivered a declaration that a copy of the work had not previously been supplied by the librarian and that the copy furnished will be used only for purposes of research or private study.<sup>43/</sup>

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40. See S. J. Liebowitz, The Impact of Reprography on the Copyright System, at 71 (1981).

41. Copyright Act of 1956, §6, United Kingdom: Item 1, CLTW (1982).

42. Id. Copyright Act of 1956, §7; see also E.P. Skone James, J.F. Mummery, J.E. Rayner James & A. Latman, Copinger and Skone James on Copyright, at 922 (12th ed. 1980).

43. The Copyright (Libraries) Regulations, 1957, United Kingdom: Item 3, CLTW (1982).

The provisions on "fair dealing", and in particular the exceptions in section 7 for libraries and archives, have been widely criticized in the United Kingdom. Concern has focused on the rapid development of the photocopying activities of the British Library Lending Division.<sup>44/</sup> Millions of copies of protected works are made each year without any form of copyright payment. It is feared that, if such large-scale photocopying practices are left unchecked, they will have an adverse impact on journal subscriptions and lead eventually to a serious breakdown in the dissemination of scientific information.<sup>45/</sup>

As a possible solution to the problems raised by the photocopying of works by libraries, the Whitford Committee, in its report to the U.K. Parliament in March 1977, recommended the establishment of a negotiated blanket licensing system.<sup>46/</sup> Under such a system, a group of copyright owners would forego their rights to take individual action with respect to the reprographic reproduction of their works; and remuneration at a set rate would be collected and distributed by a central collecting agency or society.<sup>47/</sup> In order to provide some incentive for a library to take a license, the Committee also recommended that "as and when blanket licensing schemes are in existence, the latitude given by Section 7 should no longer apply. At the same time it should be made clear that Section 6 of the 1956

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44. For general description of activities of British Library Lending Division, see Franklin Report, supra note 8, sec. 3.9.1.7, at 82; see also A. Dietz, supra note 34, at 130.

45. See E. Van Tongeren, The Effect of a Large-Scale Photocopying Service on Journal Sales, reprinted in Technology and Copyright, at 387 (G.P. Bush & R.H. Dreyfuss rev. ed. 1979).

46. See Report of the Committee to consider the Law on Copyright and Designs, Cmnd. 6732, at 70 (1977). This Committee is called the Whitford Committee after its Chairman, the Hon. Mr. Justice Whitford.

47. Id. para. 274, at 70.

Act (fair dealing for research or private study) should not allow the making of facsimile copies but only those made by hand or by using a typewriter."<sup>48/</sup>

In July 1981, the Government of the United Kingdom published a Consultative Document on the Reform of the Law relating to Copyright, Designs and Performers' Protection known as the Green Paper. Noting the position taken on blanket licensing by the Whitford Committee, the Government stressed in its report on reprography that it was prepared to consider some tightening of the limitations in sections 6 and 7 of the 1956 Act, but supported the retention of these provisions in certain cases. In this respect, it observed that:

The intention of the library exceptions was to afford certain libraries the opportunity of assisting individual students who need to have single copies. They were never intended to allow systematic copying of the same material. Accordingly, the Government is prepared to consider limiting the exceptions in section 7 so as to make it quite clear that they exclude the related production of multiple copies of the same material. Furthermore, the Government intends to follow Whitford's recommendation and limit the "research and private study" exceptions of sections 6 and 7. The effect of the proposed limitation will be to ensure that these exceptions are not used for the purposes of research carried out for the business ends of a commercial organization.<sup>49/</sup>

In its comments on the Green Paper, the Publishers Association of the United Kingdom informed the Government that, since the publication of the Whitford Report, representatives of literary copyright owners had succeeded in drafting "a detailed scheme, and produced a collective license suitable, on varying scales of fees, for different classes of users,

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48. Id. para. 276, at 70.

49. Reform of the Law relating to Copyright, Designs and Performers' Protection, A Consultative Document, Cmnd. 8302, para. 8, at 10 (1981).

particularly for libraries and educational institutions."<sup>50/</sup> It also noted that U.K. authors and publishers had established societies to represent their respective interests, and that these societies had come together to form the Copyright Licensing Authority. Presently in the process of incorporation, this new organization would be charged with issuing licenses, collecting royalties, policing the licensing scheme and arranging the distribution of fees for the photocopying of protected works.<sup>51/</sup>

Referring to the limited success of the Copyright Clearance Center in the United States, the Publishers Association stressed that the success of the new licensing scheme depended on several factors: "licensees should (a) be encouraged to participate by withdrawal of the existing 'fair dealing' exception under s.6, and the repeal of the 'non-profit library' exception for single copies from periodicals under s.7, and (b) the licensee should not be put under the onus of determining whether or not a particular act of photocopying was permitted under ss. 6 or 7."<sup>52/</sup> Although they preferred the elimination of the "fair dealing" exception in section 6, as an alternative, the publishers were prepared to accept a limited provision designed to meet the reasonable needs of small users. Insofar as licensed institutions were concerned, however, they urged the complete repeal of the library exceptions in section 7.<sup>53/</sup>

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50. Comments of the Publishers Ass'n to Her Majesty's Government on the Consultative Document Cmnd. 8302, para. 10.8, at 49 (1982).

51. Id. para. 10.9.

52. Id. para. 10.13.2, at 53.

53. See Id. para. 10.14, at 54.

With respect to the use of protected works in computerized information storage and retrieval systems, the Publishers Association specifically endorsed the proposal set forth in the Green Paper that "the act of loading a [computer] program, or any other literary or artistic work fixed in a form from which then [sic] can be reproduced into a computer, should be defined as a restricted act. . . ."54/ They expressed certain reservations, however, concerning the subsequent use of the work. In this respect, it was noted that "[t]here are, indeed, likely to be separate rights emerging in the work itself and in its use by means of computerised reproduction (as with the performing right), which may be separately licensed or assigned."55/ They stressed that such new uses of copyright works, in particular the enforcement of rights in practice, further illustrate the obsolete nature of the exceptions in sections 6 and 7 of the 1956 Act.56/

The Library and Information Services Council of the United Kingdom, in its comments on the Green Paper, proposed that "[t]he s.6 and s.7 fair dealing rights should be inalienable, and agreements to assign or waive them should be ineffective."57/ The Council urged that the fair dealing exceptions in sections 6 and 7 be extended to apply to all formats and materials, particularly to computer applications. In their opinion, this amendment was necessary, "since the need to make copies will become as

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54. Id. para. 11.2, at 62.

55. Id. para. 11.4, at 63.

56. See id. para. 11.7, at 64.

57. Comments by the Library and Information Services Council on Reform of the Law Relating to Copyright, Designs and Performers' Protection, LISC (82) 25, at 3 (1982) (report submitted by letter dated Aug. 19, 1982, to Rt. Hon. Paul Channon, MP, Minister for the Arts & Libraries, by Prof. W.L. Saunders, the Council's Chairman).

important in the case of computerised software and data as it is now in relation to printed materials. The photocopying of books and journals etc. will gradually become less important as more data is stored in computer form and copying takes place from computer to computer or by hard copy print out."<sup>58/</sup> They also suggested that, under certain circumstances, the copying of a whole work, by an individual or institution, from one format to another or within one format, should be deemed fair dealing.

The Council opposed the exclusion from sections 6 and 7 of copying done "for the purposes of research carried out for the business ends of a commercial organization," since they thought it would inhibit the flow of information and limit the effectiveness of British industry.<sup>59/</sup> They asserted that the proposed limitation would increase substantially the administrative costs of services providing a large number of copies, such as the British Library Lending Division [BLLD].

With respect to systematic or multiple copying, the Council expressed concern about certain ambiguities in the language of the Green Paper. They were generally apprehensive that the Government intended "to exclude from s.7 the making by a library of one copy for a series of individuals over a period of time (for the purposes allowed under s.6) . . . ." <sup>60/</sup> They feared that such a change might hamper the ability of library and information services, and in particular the BLLD, to provide photocopies cheaply and quickly.

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58. Id. para. 20, at 16.

59. Id. para. 24, at 17.

60. Id. para. 28, at 19.

Since comments on the Green Paper have only recently been submitted to the Government of the United Kingdom by the various groups concerned, it is unlikely that these proposals will be acted on in the near future.

### 3. Japan

The rights of authors to control the reproduction and distribution of their works have been studied in many other countries. Even where systems have been developed to protect these rights, new developments in technology have necessitated their continual reevaluation. In certain cases, there has been some hesitancy to set new standards while the technology is still evolving. It has been suggested that efforts should be undertaken to educate users about the need to respect the rights of owners of copyright. Since the ability to control the copying of works is eroding rapidly, the cooperation of consumers will be an important factor in the enforcement of any new system that may be developed. This approach has been particularly stressed by the Government of Japan. Although the present copyright law of Japan is of a rather recent vintage, certain provisions have already been reexamined there in light of changes in technology.

Under the Japanese copyright law of 1970, the exclusive right of an author to reproduce a protected work is expressly recognized. This right is subject to several limitations, however, the most significant being the provision in section 30 for a user to reproduce a work "for the purpose of his personal use, family use or other similar uses within a limited circle."<sup>61</sup>/ This restriction for private use is generally similar

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<sup>61</sup>. Copyright Law of Japan, Law No. 48 of 1970, §§21 & 30, Japan: Item 1, CLTW (1982).



to a "fair use" or "fair dealing" exception. There is also a provision in the Japanese law permitting the reproduction of copyright works by libraries under specific circumstances.<sup>62/</sup>

In July 1974, the Copyright Council of the Japanese Agency for Cultural Affairs appointed a Subcommittee "to study the impact of the development and use of copying machines on copyright."<sup>63/</sup> The Subcommittee completed its work and, in September 1976, its report on reprography was published by the Agency for Cultural Affairs.<sup>64/</sup>

With respect to reproduction for private use, the Subcommittee was of the opinion that the provision only applied where the reproduction was personally undertaken by the user and that it was not permissible to use a copying service or a coin-operated machine.<sup>65/</sup> Although the Subcommittee did not propose any new language for the limitation on private use, it urged that measures be adopted "aimed at deepening the understanding in the population of the meaning and purpose of Art. 30 of the Copyright Law and a wide dissemination of the concept of copyright."<sup>66/</sup> It made a similar recommendation insofar as library photocopying is concerned. Although the Subcommittee found that the copying practices of certain major libraries could be considered illegal under a strict interpretation of section 31 of the copyright law, it concluded that reproduction in libraries, as a whole,

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62. Id. Copyright Law of Japan, §31 (reproduction in libraries, etc.).

63. See T. Doi, The Intellectual Property Law of Japan, at 213 (1980).

64. G. Rahn, Reprography and Copyright Law in Japan, 10 IIC, 710, 711 n. 8 (1979).

65. Id. at 715.

66. Id. at 716.

was generally handled correctly.<sup>67/</sup> It urged, however, that courses be offered to library employees to help them better understand the application of the copyright law in their work.

The report of the Subcommittee also discussed establishment of a central organization to control the exploitation of protected works.<sup>68/</sup> Such a collecting society could be based on collective agreements with users for the reprography of works in return for the payment of a set fee. In light of the recommendation of the Subcommittee, the Agency for Cultural Affairs set up a small group in November 1980 "to study the possibility of establishing a mechanism for collective administration of copyright in the field of reprography. Taking up the examples of the Copyright Clearance Center in the United States and the VG WORT in the Federal Republic of Germany, the Group studies how to get applications from users of copyrighted works, how to collect copyright royalties from users, how to distribute them among copyright owners, etc."<sup>69/</sup> The Group is expected to submit proposals on this matter sometime next year.

#### 4. Other proposals

Many other methods of controlling the unauthorized reproduction and distribution of copyright works have been discussed. Some would impose a levy on the machines used to do the copying, while others would establish a system of compulsory licensing, in the event a voluntary licensing agreement could not be reached. Such a system was outlined in a resolution

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67. Id. at 725.

68. See id at 727.

69. Letter to U.S. Copyright Office from Copyright Adviser, Cultural Affairs Dept., Japanese Agency for Cultural Affairs (Bunka-Cho) (Oct. 6, 1982).

adopted at a meeting of the Interamerican Copyright Institute held at São Paulo, Brazil in June 1977.<sup>70/</sup> Recognizing the right of authors to receive a just remuneration for the reproduction of their works, it was proposed that all machines used to reproduce protected works be registered with a central organization and that payment be made to the organization for any copies made; reproduction of copyright works on unregistered machines would be prohibited.<sup>71/</sup>

### C. Existing Systems

Several countries have taken steps in recent years to control the unauthorized reproduction or distribution of works protected by copyright. The specific details of the methods adopted vary. For purposes of discussion, they may be grouped generally into three categories: (a) collective arrangements; (b) statutory schemes; and (c) surcharge on equipment. In some cases more than one approach has been taken. Not all systems mentioned cover reprography by libraries, archives or similar institutions. Although a few of the schemes have proven effective in balancing the various interests concerned in the area of reprography, many systems are undergoing reevaluation and adaptation in light of experience.

#### 1. Collective arrangements

##### a. Swedish "BONUS System" and Authors' Fund.

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70. 1st Continental Conference on Copyright, Interamerican Copyright Institute, Resolutions 57 to 59 (São Paulo, Brazil, 1977). For discussion of proposals set forth in resolutions on reprography adopted by the Conference, see C.A. Bittar, Reprografia e Direito de Autor: Uma Proposta Para a Regulamentação Legal da Matéria, 1 RIDI 108 (1978).

71. Id. Resolution 58.

Sweden was one of the first countries to opt for a blanket licensing agreement to control the collection of fees for the copying of protected works in schools and other educational establishments. Although reproduction in single copies of works for private use is permitted under section 11 of the Swedish copyright law, it was generally agreed that the making of copies of literary and artistic works for educational purposes should be subject to some payment.<sup>72/</sup> As early as 1967, negotiations began that led to the adoption in July 1973 of the Agreement on Graphic and Photographic Reproduction for Schools in Sweden.<sup>73/</sup> Under the Agreement, payments were calculated according to the number of pages copied, determined on the basis of an accounting.<sup>74/</sup> A new Agreement on Reprography was concluded in 1981 between the Swedish Government and several organizations representing publishers and copyright owners.<sup>75/</sup> The Agreement covers the period from July 1, 1981 to June 30, 1984, and applies to photocopying in all educational institutions, including universities, for which the Government, a municipality or a county council is responsible.<sup>76/</sup>

Since 1973, payments made by the Swedish Government for the license on photocopying in educational institutions, have been distributed by BONUS, an organization formed by the negotiating parties.<sup>77/</sup> At least

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72. Copyright Statute of Sweden, Law No. 729 of 1960 on Copyright in Literary and Artistic Works, §11, Sweden: Item 1, CLTW, (1982).

73. See J. Mueller, Agreement on Graphic and Photographic Reproduction for Schools in Sweden, Copyright 236 (1973).

74. Id. at 240.

75. Agreement on Reprography at Schools and Universities, concluded on June 11, 1981 (unofficial translation received by U.S. Copyright Office from Ministry of Justice, Stockholm, Sweden).

76. Id. Arts. 2 & 22.

77. Under Article 12 of the 1981 Agreement, the Swedish Government pays remuneration for reproduction to the organization BONUS (Bild, Ord,

five administrative groups representing the five main areas of copied material receive these payments: "press, books (fiction), school textbooks, sheet music, and photographs and drawings."<sup>78/</sup> Each group receiving funds decides how to distribute them to its member organizations. While no method has been developed to distribute the remuneration on a work by work basis, a statistical analysis has been made of the type of material copied.

The negotiation of the Agreement on Reprography was facilitated by the adoption of new legislative provisions in June 1980. An amendment was made to the Swedish copyright law to allow the application of an agreement on reprography in educational institutions to published works of authors who are not members of the organization concluding the agreement, provided the organization in question represents a substantial proportion of Swedish authors in the same field.<sup>79/</sup> Although such authors would retain a right to remuneration, they may be required to submit claims for compensation only to the organization party to the agreement. An Act on Mediation in Certain Copyright Disputes was also enacted in 1980.<sup>80/</sup> The Act establishes a framework for the mediation of disputes concerning the

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Not-Upphovsrättslig Samorganisation, literally Collective Copyright Organization for Pictures, Words and Sheet Music). Id. Art. 12.

78. See supra note 29, para. 12(b), at 8.

79. Law No. 610 amending the Law of 1960 on Copyright in Literary and Artistic Works, §15a, published in Svensk författningssamling, July 22, 1980, reprinted in Copyright 57 (1981).

80. Law No. 611 amending the Law of 1960 on Copyright in Literary and Artistic Works, published in Svenk författningssamling, July 22, 1980.

conclusion of agreements on reprographic reproduction of works in educational activities. Under its provisions if the negotiating parties fail to reach an agreement in the course of the mediation process, the dispute may be submitted to arbitration.

Although the blanket licensing agreements concluded to date in Sweden have dealt primarily with the reproduction of works in educational institutions, provision has also been made for a different type of collective arrangement with respect to libraries. A Fund for Authors was established by Royal Decree "[i]n order to compensate authors and translators for the lending and for other use of their works through certain public libraries."<sup>81</sup>/ While payments from the Fund are calculated generally on a per use basis by sampling methods, according to a recent commentary, a substantial portion of the monies collected are distributed for social purposes.<sup>82</sup>/

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81. Royal Decree No. 464 of 1955 Establishing Sweden's Fund for Authors, Copyright Royalties from Libraries, Sweden: Item 3, CLTW (1982).

82. See S. Strömholm, Letter from Sweden, Copyright 59, 65 (1976); see also G. McFarlane, The Public Lending Right--A Comparison of National Approaches, Copyright 335 (1980).

b. Danish system.

While the distribution of payments by BONUS, and the apportionment of fees from the Swedish Authors' Fund, are for the most part made on a collective basis, the arrangements developed in Denmark have stressed the individual nature of the rights of authors. When establishing a collecting society, COPY-DAN, to administer copyrights and neighboring rights in new areas, the Danish authors and their representatives mutually opposed the collective use of remuneration. In drafting the statutes of COPY-DAN, they specifically provided that individual distribution as a principle could only be altered "if each participating group of authors decides so in accordance with their own rules of association."<sup>83/</sup>

In negotiating an Agreement on Reprography in Danish Schools, an attempt was made to reach agreement on a lump sum that would be sufficient to support the additional costs incurred in trying to maintain a system of individual distribution. Commenting on the approach taken in Denmark, one of the chief negotiators of the Agreement observed:

We have no doubt that we arrived at a sensible level of remuneration as a consequence of the firm intention of maintaining individual distribution. From its start the Swedish system was meant as a lump-sum compensation, the money to be used for collective purposes. This is presumably one--certainly not the only--reason that the Danish remuneration is 3-4 times the Swedish amount. In Finland the level of payment follows the unsatisfactory Swedish position, whereas in Norway the agreement was awaiting the Danish decision and accordingly incorporated the Danish figures.<sup>84/</sup>

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83. See H.L. Christiansen, Reprography in Danish Schools, Copyright 16, 17 (1982).

84. Id. at 18.

Although attempts were made in the early 1970's to adopt a coordinated Nordic copyright law reform, since 1975 most efforts have been undertaken by individual national committees.<sup>85/</sup> Insofar as Denmark is concerned, in 1981 the Danish Law Committee published its first report on the subject of photocopying.<sup>86/</sup> This report suggested that the problem of photocopying could be solved by statutory extension of collective licensing agreements to third parties. Such an amendment would provide that:

an institution, typically an educational institution, which has signed an agreement with an organization representing a considerable number of Danish authors as regards photocopying of published works originating from the members, is allowed to copy published works owned by non-members of this organization on the same condition. Thus, non-members of an organization are entitled to the same remuneration as organized members, and they are always free to ask for individual payment. However, all claims must be administered by and addressed to "Copy-Dan." . . . It should also be noted that the organizations entitled to negotiate must be approved by the Minister for Cultural Affairs.<sup>87/</sup>

#### c. System in Federal Republic of Germany

When considering collective arrangements for the payment of royalties or for the distribution of remuneration, it should be recalled that certain agreements are negotiated on the basis of an exclusive right, while in other cases there is only a right to claim remuneration.<sup>88/</sup> This distinction was noted by Dr. Adolf Dietz in a comparative law study prepared at the request of the Commission of the European Communities.

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85. See M. Kocktvedgaard, Letter from Denmark, Copyright 314, 315 (1982); see generally T. Hesser, Nordic copyright reform, 112 RIDA 3 (1982).

86. The report is entitled Licenskonstruktioner og fotokopiering (Report No. 912/1981). Id. Copyright, at 315.

87. Id. (this proposal is similar to the 1980 amendment to the Swedish copyright law discussed above).

88. See A. Kerever, The International Copyright Conventions and Reprography, Copyright 188, 194 (1976).



Although he stressed that most countries of the European Economic Community grant exclusive exploitation rights to authors, he observed that there is a growing tendency to allow the use of a work without the author's permission, subject to a claim to compensation.<sup>89/</sup>

Such a limitation on exclusive rights was discussed by the Federal Constitutional Court of the Federal Republic of Germany in a July 1971 decision. As noted in a recent case, the Court decided that:

the interest of the general public to an unhindered access to cultural assets would certainly justify that protected works be taken after their publication and without permission of the author, in collections for church, school, and instructional use, but not that the author must make his work available for these purposes without royalty. . . . The exclusion of a compensation claim could not be justified by every consideration of the common weal; the interest of the general public to an unhindered access to copyrighted works, standing alone, especially does not suffice.<sup>90/</sup>

Although an author's right of reproduction is clearly recognized in the copyright law of the Federal Republic of Germany, an exception is made in sections 53 and 54 of the law for certain personal and other internal uses. Under section 54, a person is authorized to make individual reproductions of a protected work for scholarly purposes and for other specified internal uses.<sup>91/</sup> Although reproduction under this provision is permissible without prior authorization, where reproduction is for commercial purposes, the person making the copy is generally required to

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89. See A. Dietz, Copyright Law in the European Community, at 78 (1978).

90. Decision of Federal Constitutional Court (July 7, 1971), cited with approval in Verwertungsgesellschaften Wissenschaft und WORT v. Freie Hansestadt Bremen, Federal Supreme Court (Bundesgerichtshof), Case No. 1 ZR 111/76 (1978), reprinted in Copyright Law: Germany, 10 IIC 265, 267 (1979).

91. Copyright Law of the Federal Republic of Germany, §54, Germany (Federal Republic of): Item 1, CLTW (1982).

pay an equitable remuneration to the author.<sup>92/</sup> It is understood, however, that reproductions made by "physicians, lawyers, university professors, etc. are not commercial ones in this meaning; the same is true of reprographic reproductions made by public authorities."<sup>93/</sup>

On the basis of the express recognition in section 54(2) of a right to remuneration for certain commercial reproductions, a framework agreement was concluded between the Federal Association of German Industry and an organization representing German publishers and booksellers (now VG Wissenschaft merged with VG Wort).<sup>94/</sup> Under this agreement, provision was made for three systems of remuneration:

- payment received from stamps sold by the collecting society to be placed on all copies of a work;
- remuneration paid to a collecting society and calculated as a percentage of the subscription price of only those specified periodicals of which the enterprise intended to make photocopies;
- a similar system, but one in which a lower rate of remuneration was payable, on the understanding that the enterprise would pay the remuneration in respect of all periodicals to which it subscribed.<sup>95/</sup>

Although initially many industrial enterprises opted for the stamp system, in view of labor costs, most were on the price system as of June 1975. A different type of arrangement was made between the Federal Government and a collecting society representing journalists. Under that agreement, payment

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92. See id.

93. P. Katzenberger, Copyright and Reprography, 11 Law and Computer Technology 30, 33 (1978).

94. See A. Dietz, supra note 89, at 126; see also F. Melichar, Photocopying of Works Protected by Copyright, 14 GEMA 51, 53 (1975).

95. Report, supra note 13, Copyright, at 166; see also A. Dietz, Audio and Video Recordings and Reprography for Private Use in the Law and Practice of the Federal Republic of Germany, 1 Media Law and Practice 237, 257 (1980).

was made on the basis of a specific amount per page.<sup>96/</sup> It has generally been estimated that the total amount paid by German industry in 1975 for all photocopying of protected works was less than DM 500,000.<sup>97/</sup>

For the reproduction of protected works by libraries and archives the situation in the Federal Republic of Germany is not clear. According to one analyst:

It seems to be permissible for users of libraries to make reprographic copies themselves (with coin-operated machines) and to cause such copies to be made (even by the library), using borrowed books and periodicals as originals for the reproduction. In practice it is also considered to be permissible for libraries and documentation centers to mail copies on demand and advertise publicly for that service.<sup>98/</sup>

There appears to be a limitation, however, on the number of "individual" copies that may be made for certain internal uses. Pursuant to a 1978 decision of the Bundesgerichtshof, "[t]he royalty-free production of 'individual' photocopies of copyrighted portions of a published work or of individual articles from newspapers or magazines for one's own use, permitted according to Sec. 54(1) (4a) of the Copyright Law, may in no case exceed 7 copies."<sup>99/</sup> It has also been asserted that the number of individual reproductions of a work for personal use that may be made under section 53(1) should be limited to "about six to seven copies."<sup>100/</sup>

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96. Id.

97. See F. Melichar, supra note 94.

98. P. Katzenberger, Copyright and Reprography, 11 Law and Computer Technology 30, 34 (1978).

99. Verwertungsgesellschaften Wissenschaft und WORT v. Freie Hansestadt Bremen, official headnote, supra note 90, 10 IIC, at 265.

100. Views of Federal Minister of Justice, id. at 267.

Moreover, a line has been drawn when it comes to the unauthorized storage of protected works in computers and the creation of microfilm archives of such works for use in automated information retrieval systems.<sup>101/</sup>

Although an author's right to control the reproduction of his or her work by libraries may be limited, the copyright law of the Federal Republic of Germany contains a specific provision with respect to the hiring or lending of copies of a work by certain libraries. Where further distribution is permitted under section 17(2) of the law, an equitable remuneration must be paid to the author "if the copies are hired or lent through an institution accessible to the public (library, record library or collection of other copies)."<sup>102/</sup> It is also provided that any claim to remuneration for the public hiring or lending of a work must be asserted through a collecting society.<sup>103/</sup>

After several years of negotiation, a mechanism was established for the payment of compensation for the public lending of works [PLR] in a general contract between "the federal government and the eleven federated states (Länder) on the one hand, and four collecting societies on the other. The contract provides that authors cannot apply for PLR as

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101. See P. Katzenberger, supra note 98, at 34.

102. Copyright Law of the Federal Republic of Germany, supra note 91, §§ 17 & 27.

103. Id. § 27. Collecting societies in the Federal Republic must comply with the provisions of the Act dealing with the Administration of Copyright and Related Rights. See Administration of Copyright, Germany (Federal Republic of): Item 2A, CLTW (1982).

individuals, but only through a collecting society to whom they assign their PLR rights."<sup>104/</sup> The contract runs to 1985, but provides that the size of the lump sum paid may be renegotiated every two years.<sup>105/</sup>

On September 8, 1982, the Ministry of Justice of the Federal Republic of Germany completed work on a draft bill to change certain legal provisions in the area of copyright law.<sup>106/</sup> Among other measures, the bill would amend the 1965 copyright law of the Federal Republic with respect to remuneration due for the reprographic reproduction of copyrighted works. The Federal Government's bill passed the Bundesrat on the 29th of October and has now been sent to the Bundestag.<sup>107/</sup>

As noted in a communication received from the Federal Ministry of Justice, the Government's bill provides for the payment by the operator of a photocopying machine of compensation for the reprographic reproduction of copyrighted works for private and other personal use. Under the proposed amendment, the amount of copyrighted material reproduced on a given machine would be estimated according to the total amount of copies made on it and the area in which the machine was located, since it was concluded that

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104. For discussion of the public lending right in the Federal Republic of Germany, see O. Koch, Situation in Countries of Continental Europe, Library Trends 641, 652 (P.D. Morrison & D. Hyatt ed. 1981); see also Franklin Report, *supra* note 8, at 127.

105. *Id.* Library Trends, at 653.

106. The Ministry of Justice of the Federal Republic of Germany has transmitted a copy of the Government's bill to the U.S. Copyright Office, with a general summary in English of the proposed amendments to the copyright law. A preliminary English translation of the bill has been prepared for the Library Congress; an official English translation should be available shortly.

107. Letter to the U.S. Copyright Office from the Ministry of Justice of the Federal Republic of Germany (Nov. 8, 1982).

machines in different areas are used to varying degrees to reproduce protected works. An example provided by the Ministry of Justice illustrates this point:

in a library the percentage of copyrighted material will be considerably higher than in a normal office. The operator has to give information on how many copies have been made with this machine in total and where this machine is used. The collecting society will then apply a standardised percentage for the special area in which the machine is being operated. It could, e.g., be said that in libraries 65% of the total amount of reproductions are done from copyrighted material, whereas in a normal office only 0.5% of the total amount of reproductions are from copyrighted material.<sup>108/</sup>

It was noted, however, that the percentages cited were merely estimates and that standardized figures for specific areas could only be determined by the collecting societies on the basis of evaluations of reproductions done on machines of selected operators.

The draft bill would also fix in the law the amount of the compensation due for such reproductions. The compensation thus set would be subject to change by way of agreement, or to adjustment by the Federal Minister of Justice, with the consent of the Federal Minister for the Economy, if required by a significant change in economic conditions or because of the technical situation. The compensation rates set in the bill are "per page 0.04 Deutsche Mark generally. For copies done with machines which are mainly used for photocopying material for teaching in schools, universities or for scientific research the remuneration will be 0.02 Deutsche Mark."<sup>109/</sup> According to the Official Justification of the Government Draft, it is assumed:

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<sup>108.</sup> Id. at 3.

<sup>109.</sup> Id. at 4 (the compensation rates are set forth in an Appendix to the Federal Government's bill).

that the payment of the compensation claim will generally be carried out on the basis of general or lump-sum agreements, which organizations, corporate entities according to public law, or individual operators will conclude with the collecting societies authorized to administer rights. . . . The provision concerning the assessment of suitable compensation provided in the draft shall only go into effect in situations where there is no general or lump-sum agreement, and where an operator is not willing to make use of an existing general agreement.<sup>110/</sup>

While compensation claims for reprographic reproduction could be brought only by collecting societies on behalf of claimants, the Government's bill would expand the jurisdiction of the present Arbitration Committee to include disputes between such societies and individual users.<sup>111/</sup>

In preparing the bill, it was not possible for the Federal Government to calculate the exact volume of copies made of all materials, and in particular the total number photocopies produced, as well as the proportion of them subject to copyright. The Government was able to determine, however, that the number of copies made of protected works without compensation far exceeded that intended by the drafters of the 1965 copyright law. They concluded that photocopying of copyrighted works had reached such a large volume that it constituted a new use of protected works for which an appropriate remuneration should be paid.<sup>112/</sup>

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110. Official Justification of the Government Draft of a Bill to change legal provisions in the area of copyright law, Federal Parliament Printing #370/82, Concerning Article 54 (Sept. 17, 1982) (unofficial translation).

111. See Draft of a bill to change legal provisions in the area of copyright law, §14, Federal Council (Bundesrat), Federal Parliament Printing #370/82 (Sept. 17, 1982).

112. See supra note 110.

By introduction of a compensation obligation for the production of photocopies of protected works for private or other personal use, it was projected that the Federal Republic, States and communities would incur additional costs of 17 million DM annually.<sup>113/</sup> The Official Justification of the Government's Draft noted that the additional costs would fall primarily on the States "because of the particularly intensive duplication activity in the area of universities and scientific and scholarly libraries."<sup>114/</sup> The Federal Government based its estimates on the assumption:

that 20 billion reprographic copies are produced annually in the Federal Republic of Germany, 3.2 billion of them in government offices (other than universities and scientific and scholarly libraries), 2.4 billion in universities and scientific and scholarly libraries, and 0.3 billion in other libraries in the public sector. The estimates are further based on a proportion of copyrighted works of 0.5% in the area of government offices, and 65% in the area of universities and scientific and scholarly libraries.<sup>115/</sup>

In any event, it was intended that a portion of the increased annual costs attributable to the compensation claim could be passed on to library users by the states and communities concerned.<sup>116/</sup>

## 2. Statutory schemes

### a. The Netherlands.

While each of the collective arrangements outlined above was developed within a specific legal context, for the most part the terms of the existing laws do not cover such details as the amount of the remuneration to be paid. Certain statutory schemes do attempt, however, to narrow the scope for negotiations concerning the reprographic reproduction of

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<sup>113.</sup> See id.

<sup>114.</sup> Id.

<sup>115.</sup> Id.

<sup>116.</sup> Id.



protected works. An early effort to establish a legislative system for reprography was undertaken by the Government of the Netherlands.

When the Netherlands Copyright Act was revised in 1972, restrictions on reprographic reproduction were introduced in sections 16b and 17. Without going into the specifics of these provisions, it may be observed that, within certain limitations, individuals are free to make, or order the making, of a few copies of protected works for their own personal use.<sup>117/</sup> Although the law permits copying of specific works by commercial enterprises without prior authorization, it requires the payment of an equitable remuneration to the owner of copyright.<sup>118/</sup>

Under the draft bill by administrative regulation the requirements of section 16b of the law could be "waived for the operation of the public service and for the performance of the tasks incumbent on public service institutions."<sup>119/</sup> Accordingly, in June 1974, a Royal Decree concerning the reproduction of copyright works was published by the Government of the Netherlands. For purposes of this Decree, certain libraries are deemed to be "public service institutions" and, in addition to fulfilling orders placed by persons pursuant to section 16b, they are permitted to make copies of protected works: "(a) in order to avoid loan of a copy of the work concerned to a particular person; (b) for inter-library loans; (c) in order to make additional photocopies, intended exclusively

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117. Law concerning the New Regulation of Copyright, § 16b, Netherlands: Item 1, CLTW (1982).

118. Id. § 17.

119. Id. § 16b.

for the purposes mentioned under (a)."<sup>120/</sup> Where more than a small part of a work is reproduced, however, the work copied must usually be either out-of-print or an article in a newspaper or periodical. Moreover, an equitable remuneration must be paid for any such reproduction. In this respect, the Decree sets forth the specific amounts that must be paid for each page copied.<sup>121/</sup> To date, the only group to make any payments has been the Government of the Netherlands, and then only for Dutch publications in the scientific field.<sup>122/</sup>

Although this statutory scheme provides for some payment to owners of copyright for the reprographic reproduction of their works, in practice, it has not been very effective. It has been observed that the replacement of the author's exclusive right with a simple claim to remuneration deprives them of their ultimate deterrent: "[w]here it used to be possible to apply for an injunction against unauthorized copying and thus also prohibit future infringements, there is now just a claim for dimes. For that sort of money, it is hardly feasible to tackle the problems case by case. And there are plenty of problems."<sup>123/</sup> According to a recent commentary, it has been extremely difficult to determine the amount of copies made:

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120. S. Gerbrandy, The Netherlands Solution to the Problem of Reprography, Copyright 47, 49 (1975); see also Royal Decree Concerning the Reproduction of Copyright Works, § 3, Netherlands: Item 1A, CLTW (1982).

121. Id. Royal Decree, § 7.

122. D.W.F. Verkade, Letter from the Netherlands, Copyright 176 (1981); see also F. Cuppen, A Report on Reprography - Stichting Reprorecht Amsterdam, at 7 (Oct. 7, 1982) (unpublished).

123. J.H. Spoor, News from the Netherlands: Copyright mediation, reprographic rights and other problems, 114 RIDA 111, 129 (1982).

Copiers are not duty bound to give information, and the law is so obscure that often nobody knows whether a copy is or isn't subject to the obligation to compensate.... Furthermore, Article 16 b, concerning copying for private use, does not apply only to private individuals but also to institutions and businesses. That means that a number of the copies on which, according to Article 17 of the Royal Decree, payment is incurred appear to be free of charge under Article 16 b.<sup>124/</sup>

What is viewed as a basic flaw in the system is the failure to establish an official clearinghouse for the collection and dissemination of royalties or to provide a legal basis for the creation of such an organization. While a private organization called the Reprographic Rights Foundation [Stichting Reprorecht] was set up in Amsterdam by representatives of publishers and authors, "it has so far been found on the whole unable to deal with its debtors, who have to pay, and yet do not have to register the copies they make, or report them, or indeed submit to internal supervision by Stichting Reprorecht."<sup>125/</sup> This situation is due in part to the fact that "[o]nly a small minority of Dutch literary writers and some Dutch publishers were willing to recognize the Foundation as their agent in this respect."<sup>126/</sup>

In 1978, the Minister of Justice attempted to improve the system by establishing a "Committee on the Collection, Administration and Distribution of Royalties" known in the Netherlands by the acronym CIBRA

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124. Id.

125. D.W.F. Verkade, supra note 122.

126. H. Cohen Jehoram, Reprography and the private copying of text, sound and image, speech delivered at meeting of the International Association for the Advancement of Teaching and Research in Intellectual Property (Geneva, Sept. 21, 1982).

or, after its chairman, the Martens Committee.<sup>127/</sup> On May 30, 1980, the Minister of Justice informed the Martens Committee that, as an interim measure, he intended to make certain changes in the current legal provisions. Until the CIBRA could recommend a long-term solution to the reprography issue, he proposed generally that: (1) a private clearinghouse organization be appointed as a collecting agency; (2) copyists be required to indicate the total number of copies made; (3) a percentage of the pages copied be subject to the payment of royalties, the percentage to vary depending on the category of user; and (4) the general administrative regulations concerning industry should be updated.<sup>128/</sup>

While the majority of the Martens Committee agreed with the proposals put forward by the Minister of Justice, not all members were enthusiastic. There was some concern that the adoption of the proposed changes might hamper the introduction of a more permanent system.<sup>129/</sup> They fully supported, however, the establishment of an effective distribution scheme and offered detailed guidelines for the creation of such a system.<sup>130/</sup>

The Martens Committee finally published its report on May 4, 1982. It has now advised the Netherlands Government that a single collecting society "should get statutory power to act on behalf of all the authors, the exemption of remuneration for copies for personal use should

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<sup>127.</sup> D.W.F. Verkade, supra note 122.

<sup>128.</sup> Letter from Minister of Justice to the Committee on the Collection, Administration and Distribution of Copyright Royalties, reprinted in CIBRA advies interimregeling reprorecht, 3 Auteursrecht 63 (1981).

<sup>129.</sup> The Recommendation of the Committee on the Collection, Administration and Distribution of Copyright Royalties, id.

<sup>130.</sup> Guidelines for a Distribution Settlement, id. at 65.

be abolished and the retribution [distribution] of the royalties should be tied along the lines of a certain global division between categories of literature."<sup>131/</sup> It suggested that:

those making photocopies have to report the quantity of copies regardless protected by copyright as well as not protected, or owned by the photocopier himself; that the Minister of Justice fixes a percentage which is supposed to be protected material, counter proof to the fixed percentage allowed; that the collecting society pays out according to given rules.<sup>132/</sup>

The Committee also set forth what it considered to be the "main rules" governing the distribution of the amounts collected by the society.<sup>133/</sup>

In its report, the Martens Committee dealt generally with the question of "whether there is any need for institutionalized mediation for collection in one or more fields of copyright."<sup>134/</sup> In this respect, it proposed that a Chamber of Copyright and a Copyright Arbitration Tribunal be created for the settlement of disputes concerning the collection and distribution of royalties and for the fixing of reasonable rates of compensation in the event of statutory licensing.<sup>135/</sup> It advocated "the creation of a central organization for the tracking-down of copyright infringements on behalf of the affiliated organizations; and this it would do with a view to both criminal prosecution and civil action."<sup>136/</sup>

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<sup>131.</sup> See H. Cohen Jehoram, supra note 126.

<sup>132.</sup> F. Cuppen, supra note 122, at 8.

<sup>133.</sup> Id.

<sup>134.</sup> J.H. Spoor, News from the Netherlands: Copyright mediation, reprographic rights and other problems, 114 RIDA 111, 115 (1982).

<sup>135.</sup> See id. at 117.

<sup>136.</sup> Id. at 119.

Although authors' organizations have welcomed the proposals put forward by the Martens Committee, perhaps because they are already subject to a statutory licensing scheme and hope for some improvement, none of the recommendations is expected to be acted upon in the near future.<sup>137/</sup> One commentator has even suggested that it might be more effective to "leave it to the parties concerned to regulate reprographic rights, on the basis of the absolute right," offering the case of music copyright as a precedent.<sup>138/</sup>

b. Australia.

Of the statutory solutions adopted to date, the Australian Copyright Amendment Act of 1980 is the most comprehensive. Instead of setting forth vague, general exemptions, the new provisions on reprography generally take a quantitative approach along the lines of the Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions that was negotiated under section 107 of the U.S. Copyright Act of 1976.<sup>139/</sup>

The revision effort in Australia was led by a Committee established in June 1974:

To examine the question of the reprographic reproduction of works protected by copyright in Australia and to recommend any alterations to the Australian copyright law and any other measures the Committee may consider necessary to effect a proper balance of interest between owners of copyright and the users of copyright material in respect of reprographic reproduction.<sup>140/</sup>

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137. See id. at 125.

138. Id. at 141.

139. See Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions, reprinted in H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., at 68 (1976).

140. Report of the Copyright Law Committee on Reprographic Reproduction, para. I.01, at 3 (Oct. 1976).

The appointment of what became known as the Franki Committee took on a certain urgency following a well-known court decision on the use of photocopying machines in the library of the University of New South Wales.<sup>141/</sup>

Throughout their scholarly and comprehensive effort to learn more about photocopying practices in Australian schools, libraries and other institutions, and to try to formulate possible compromise solutions, the Franki Committee was conscious of the special role played by this new technology in bringing information to the more remote areas of their country. They were also aware of the delays and difficulties encountered in trying to obtain works from geographically distant publishing houses: access to copying machines helped alleviate these problems, particularly in educational institutions.<sup>142/</sup>

Following publication of the Report of the Copyright Law Committee on Reprographic Reproduction in 1976, the Australian Parliament took the matter up and, on September 19, 1980, enacted legislation to implement generally the recommendations put forward in the Report.

The solution adopted by the Australian Parliament was to amend the copyright law, rather than to rely on voluntary blanket licensing schemes to control the use of photocopying machines in libraries and other establishments. The new Australian law is complex and detailed. Among other matters, it establishes specific criteria to determine whether a

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141. University of New South Wales v. Moorhouse, 6 ALR 193 (1975). The court held that: "the University did not adopt measures reasonably sufficient for the purpose of preventing infringements taking place. It follows that in these circumstances, when Mr. Brennan used the means provided by the University to make an infringing copy, he was authorized by the University to do what he did." 6 ALR, at 204.

142. See generally C.B. Marks, Reprographic Reproduction - The Australian Solution, 192 Interauteurs 58 (1981).

given use of a work for the purpose of research or study constitutes "fair dealing", contains detailed provisions for copying by libraries and archives, including procedures for inter-library supply of copies, and provides for multiple copying by educational institutions under statutory license.<sup>143/</sup>

On copying by libraries and archives, the 1980 Amendment covers four different cases: "(1) copying for users for the purpose of research or study (s 49); (2) copying for other libraries or archives and inter-library loan (s 50); (3) copying of unpublished works in libraries or archives (s 51); (4) copying for preservation and other purposes (s51A)."<sup>144/</sup> Generally, under section 49, a non-profit library or archive may supply a photocopy of a single article from a periodical publication, or a reasonable portion of other published works, if the user submits a signed declaration that the copy is required for the purpose of research or study and that it will not be used for any other purpose.<sup>145/</sup> The Act also clarifies the liability of libraries or archives with respect to the making of infringing copies on coin-operated machines installed on their premises. Provided a notice in prescribed form is placed on or near the machines, a library or archive is not liable for authorizing any such infringement "by reason only" that the copy was made on their machines.<sup>146/</sup>

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143. For detailed information concerning the Copyright Amendment Act 1980, see J. Lahore, Photocopying: A Guide to the 1980 Amendments to the Copyright Act (1980); see also Australian Attorney-General's Department, Copyright (Aug. 1, 1981).

144. J. Lahore, Photocopying: A Guide to the 1980 Amendments to the Copyright Act, at 12 (1980).

145. See Copyright Statute of Australia, §49, Australia: Item 1, CLTW, (1982).

146. Copyright Statute of Australia, §39A.



### 3. Surcharge on equipment

While a direct copyright solution to the reprography of protected works by libraries and archives is clearly the most acceptable, there has been some discussion of the imposition of a surcharge on equipment used to reproduce and/or distribute copyright works. This method may be predicated on the taxation authority, or it could be enacted as part of the copyright law, as an indirect royalty for the benefit of authors and copyright owners. The surcharge solution was suggested by the Commission of the European Communities as a means of harmonizing the European laws on this matter.<sup>147/</sup> It has also been proposed by the Book Trade Confederation of the Federal Republic of Germany "that a once-only sales tax be levied on reproduction equipment--similar to the well-known provision in Article 53(5) of the Copyright Act which already applies to equipment for reproducing sound or images--and also strive for additional overall agreements on annual lump-sum payments with the so-called large-scale copiers (schools, universities, libraries, etc.)"<sup>148/</sup> This approach was specifically rejected, however, by the Federal Government in drafting a bill to counter the rapid growth in the photocopying of protected works for private and other personal uses.<sup>149/</sup> There has also been passing mention of this method in

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<sup>147.</sup> See supra p. 6.

<sup>148.</sup> A. Dietz, Letter from the Federal Republic of Germany, Copyright 85, 86 (1980).

<sup>149.</sup> For a discussion of the Government's reasons for not incorporating the proposal of the German Book Trade in its recent draft bill on copyright, see Official Justification of the Government Draft of a Bill to change legal provisions in the area of copyright law, supra note 110.

connection with the revision of the copyright law in the Netherlands.<sup>150/</sup> To date, however, France appears to be the only country that has actually applied a surcharge on machines used for reprography.

Under article 22 of the French Finance Law of 1976, and Decrees issued in June and July 1976, producers and importers of certain copying machines are required to pay a levy to a special Treasury account called the National Book Fund.<sup>151/</sup> It is understood that "[t]his fund has to be put in a position to finance the activities planned under the 'Books Policy' and the modernization of printing plants. It is provided that almost all the receipts for 1976 will be transferred to the National Center of Letters."<sup>152/</sup> According to one commentary, the revenues collected are to be used to buy additional French literature and thereby compensate publishers indirectly for any damage caused by photocopying practices.<sup>153/</sup>

The French surcharge on equipment was challenged in an action brought before the European Court of Justice by the Commission of the European Communities.<sup>154/</sup> The Commission asserted that the levy imposed under the Finance Law of 1976 on the importation into France of machines to be used for reprography was equivalent to a customs duty and as such not

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150. See N. Van Lingen, reprorecht: reparatie en repartitie [reproduction law: compensation and distribution], 3 Auteursrecht 67 (1981).
151. Loi de finances pour 1976, no. 75-1278 of Dec. 30, 1975, Arts. 22 & 38, J.O.R.F. 13564 (Dec. 31, 1975); Decret no. 76-514 of June 11, 1976, J.O.R.F. 3572 (June 13, 1976); and Liste des appareils soumis a la redevance sur l'emploi de la reprographie instituee par l'article 22 de la loi de finances pour 1976, J.O.R.F. 4279 (July 17, 1976).
152. X. Desjeux, Reprography and Scientific Publications: The Creation of a Form or the Retailing of Ideas?, Copyright 254, 258 (1977).
153. Franklin Report, supra note 8, at 123.
154. Commission des Communautés Europeenes c/ République Française, Cour de Justice des Communautés Europeenes, reprinted in 109 RIDA 191 (1981).

permitted under specific provisions of the Treaty of Rome that established the European Economic Community. Since the production of these machines in France was limited when compared with the number imported, they stressed that the surcharge fell almost exclusively on imports. In light of the evidence presented and the views expressed by the parties, the Court upheld the French law. By decision of February 3, 1981, it concluded that the law did not violate the Treaty, since it did not apply solely to imports.<sup>155/</sup> The Court reasoned that the tax in question was part of a general system of internal taxation, included in a fiscal mechanism adopted to fill the gap in the legal protection of the rights of authors and publishers of books caused by the growth in the use of reprography, and intended, albeit indirectly, to subject the users of these processes to a compensatory charge that they should normally be expected to pay.<sup>156/</sup>

A French copyright expert, Professor Andre Francon, has expressed reservations about the Court's linkage of the reprography tax with the copyright law. In his opinion, this approach is dangerous: the payment of the tax could be construed as permitting the reproduction by photocopying of protected works and exempting the copier from compliance with the restrictions on reproduction for private use set forth in section 41(2) of the law of March 11, 1957.<sup>157/</sup> He noted that, in light of both the legislative history of the French Finance Act of 1976, and a recent decision of the Tribunal de Commerce de Paris [October 20, 1980], reproductions that are not allowed under §41(2) of the law, and in particular reproductions for collective use, such as those carried out in

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155. Id. at 205.

156. Id.

157. Id. A. Francon, Note, at 207.

universities, libraries and business organizations, would not be exempt from the payment of copyright royalties by reason of the tax on the sale or importation of photocopying machines.<sup>158/</sup>

#### D. General Observations

From this review there appears to be a fairly widespread recognition that certain photocopying practices infringe a copyright owner's exclusive right of reproduction, or at least the right to receive an equitable remuneration. While some legislators have opted for a vague fair dealing or private use standard, leaving to courts or voluntary agreements the task of filling in the details, others have tried to set specific limits in their respective laws and regulations.

A difficulty encountered in most cases is the lack of an effective mechanism for the collection and distribution of royalties. While progress has been made toward the establishment of collecting societies in certain countries, and efforts are currently under way to coordinate the different schemes at the international level, there is still much to be done.

Most research to date on copying by libraries, archives and similar information services has focused on the making of paper copies; only preliminary consideration has been given to the development of automated information retrieval systems. It is recognized that this use of new technology to provide access to copyright works may well make most exceptions for private use or fair dealing obsolete. Concern has been expressed that once a single copy of a work is stored in a computerized information system, it may no longer be possible to control subsequent uses

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<sup>158.</sup> Id.

of the work; and it is generally agreed that the nature and scope of authors' rights in this area should be clarified. There may also be a need to develop a machine-readable coding system to identify owners of copyright and perhaps set conditions for the payment of royalties.

The age of computers and of electronic document storage and transmission is different from the age of print. The concepts of fair dealing and exceptions for copying protected works, shaped for print, do not translate easily into the new era. As a result, both proprietary and user communities have asked whether the present print-based copyright system preserves a balance of social interests in the electronic information environment of the near future. As arduous as the work has already been, the task of designing an efficient and just information system, with a just and workable balance and the capacity for dynamic and continuing adaptation, has hardly begun.

## VIII. LEGISLATIVE PROPOSALS OF RECORD

The Copyright Office invited comment, both in the hearings and written submissions, about the need for changes in the copyright law. Specific proposals were submitted on the record by individuals and by associations such as the Authors League of America, the Music Library Association, the Music Publishers' Association, the Society of American Archivists, and the Association of American Publishers. These proposals will be analyzed in this chapter. Most of the major library associations (the American Library Association, the Association of Research Libraries, the Special Libraries Association, and the Medical Library Association) made no proposals for legislative change, and are apparently satisfied that the current statute, as interpreted by them, achieves on the whole a fair, workable balance.

A. Eliminate Paragraphs (c), (d)(1), (e)(1), (g), (h), and (i) of Section 108

1. Analysis of the proposal

One of the most far-reaching proposals was presented by Ms. Meredith Butler, speaking as Chairperson of the Ad Hoc Committee on Copyright of the Association of College and Research Libraries. She proposed the complete elimination from section 108 of paragraphs (c), (d)(1), (e)(1), (g), (h), and (i). Ms. Butler also proposed that the CONTU guidelines and the classroom copying guidelines "should be clearly identified as illustrative and advisory only."<sup>1</sup>

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<sup>1</sup>. Chicago Hearing, at 35.

The effect of the proposal would be to place maximum reliance on the fair use doctrine supported only by specific library copying privileges a) for archival purposes, b) for reproduction of one copy of journal articles or small parts of any work, and c) for reproduction of one copy of an entire work or a substantial part of it (out-of-print works) following an unsuccessful, reasonable investigation to obtain a copy at a fair price. In the case of the "b" and "c" type copying, the constraint of the current Act with respect to a purpose of private study, scholarship, or research would also be removed. Under the proposal, all of the following would be eliminated: (1) the prohibitions of the Act against multiple copying of the same material on one occasion or over a period of time (where the library has substantial reason to believe it is engaging in the related or concerted reproduction thereof), (2) the prohibition against systematic copying of §108(d) material, and (3) the requirement of §108(c) that a reasonable effort to locate an unused replacement at a fair price must be undertaken before copying a published work that is damaged, deteriorating, lost, or stolen. Moreover, with the proposed elimination of paragraph (h), the remaining library copying privileges would apply to all kinds of copyrightable subject matter. The current Act essentially makes the §108 non-preservation copying privileges inapplicable to music, works of art, motion pictures, and most audiovisual works, thus requiring libraries to justify copying under §107, if at all exempt.

Finally, Ms. Butler proposed elimination of the periodic five-year review of section 108 now mandated by paragraph (i).

## 2. Copyright Office recommendation

The Copyright Office cannot commend this proposal. It is much too radical; unsupported by other participants in the public hearing and comment process; unjustified by the record, the experience with the current Act, and the King Report data; and destructive of the basic design for balance in §108.

The Copyright Office also rejects the idea that the previously agreed CONTU and classroom copying guidelines are "illustrative and advisory only." Our assessment of the guidelines has been presented earlier.<sup>2/</sup> We here repeat that the guidelines, while not statutory, were given authoritative support by the comments in the Congressional reports accompanying the Copyright Act as passed in 1976.

The Office in addition does not recommend elimination of the five-year review, but we do suggest a change in the filing month from January to March 1 of a given year.

## B. Eligibility of Military Libraries for Section 108 Copying Privileges

### 1. Analysis of the proposal

A proposal to "clarify the eligibility" of military libraries (both technical research facilities and morale support facilities intended for recreational and educational use of service members and dependents) for §108 copying privileges was submitted by Mr. William Gapcynski, Chief of the Intellectual Property Division of the Office of the Judge Advocate General, Department of the Army.<sup>3/</sup> According to the proponent, access to either type of military library facility (research or recreational) is

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2. See, text supra IV A(4)(c).

3. App. III, Part 2, at 8-9.



generally limited to service members, civilian defense employees, and dependents of either class. Moreover, many libraries are located on military installations access to which by the general public is controlled; and access to some of the technical libraries is restricted to persons possessing the requisite security clearance because of the classified materials the library contains.

As Mr. Gapcynski notes, a persistent researcher should be able to surmount these obstacles to access, but "the circumstances raise some doubt concerning whether these libraries meet the [open or available to the public] condition of the statute."<sup>4</sup>/ Accordingly, he recommended a clarifying amendment, without proposing any specific text, and further recommended that §108 eligibility be extended to "all publicly owned libraries or archives whose function is to serve some public purpose, even though they may not grant access to the public generally."<sup>5</sup>/ Specific reference was made to libraries owned by state or local governmental bodies, and judicial or legislative facilities.

## 2. Copyright Office recommendation

The need for an amendment regarding the eligibility of military libraries for section 108 copying privileges is dependent, of course, upon the correct interpretation of the current Act and the nature of the access to a particular library. Particular military libraries may be able to meet the eligibility conditions of the Act now.

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<sup>4</sup>. Id. at 8.

<sup>5</sup>. Id. at 9.

To the extent that the obstacles to access to particular military libraries are substantial (perhaps requiring repeated letters to obtain permission, if granted at all, or special appeals to high levels of authority), the particular military library is probably not eligible for §108 copying privileges. Realistic availability of the library's collection to the public or specialized researchers in the field is an important element of the intended Congressional balance between the interests of creators and the needs of users. Congress did not intend to accord the special copying privileges of §108 to libraries which are effectively closed to the public.

The Copyright Office believes, however, that technical military libraries and morale support libraries can bring themselves within the ambit of the current Act by making clear the reasonable conditions under which specialized researchers are allowed access to library facilities. The Office, therefore, will not recommend this amendment to Congress since it is not necessary. Moreover, the Office would not favor extending eligibility to "all publicly owned libraries," including those not open to the general public. The Office believes that the present eligibility conditions are fair to creators and users, and that the concerns of special libraries, such as military ones, are accommodated by conditioning eligibility on openness of the library to specialized researchers in the field.

C. Eliminate the "One Article" Per Periodical Restriction of Section 108(d)

1. Analysis of the proposal

Three librarians<sup>6/</sup> separately made the same proposal: to remove the "no more than one article or other contribution to a copyrighted collection or periodical issue" restriction from section 108(d). As justification, the librarians pointed out that many periodicals employ a theme concept, which naturally leads to requests for two or more articles relating to the same subject. They also argued that it is unfair and arbitrary to retain the "one article" restriction when a single request for two articles from the same issue may be the only request for copies from that periodical title for the entire year.<sup>7/</sup>

2. Copyright Office recommendation

As one of the fundamental elements of the §108 balance, the "one article" restriction of paragraph (d) should be eliminated only if the experience of the last five years demonstrates an imbalance -- in this case, that the effect of the restriction is to deny users access to a significant degree, without any countervailing benefit to authors and copyright owners. The Copyright Office finds no basis for such a conclusion in

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6. The proponents were Barbara Rystrom, University of Georgia [App. III, Part 2, at 10], Suzanne Murray of the State University of New York Upstate Medical Center, [App. IV, Part 2, at 235-236], and Maureen Seaman of the Oregon Graduate Center [App. VII, at 19].

7. Ms. Seaman also cited the frequent publication of two-part articles [App. VII, at 19], but the Copyright Office does not believe the "one article" provision prohibits libraries from copying both parts of a two-part article.

the record contained in the appendices to this Report and therefore cannot commend the proposal to eliminate the "one article" restriction of section 108(d).

Paragraph (d) permits library copying without paragraph (e)'s pre-condition of a reasonable investigation and attempt to obtain a copy at a fair price, precisely because paragraph (d) permits copying of only a small part or one article for a particular user, whereas paragraph (e) permits copying of an entire work or a substantial part thereof. There is a clear trade-off between the amount of the work that may be copied on the one hand, and the administrative burden placed on libraries to seek copies on the market, in lieu of photocopying, to satisfy user requests.

The basic copying privilege of §108 applies only to small parts of a work because this type of copying, as long as it is not systematic or multiple, tends not to injure the potential market for the original. Copying of the entire work or substantial parts thereof does tend to displace the market for the original; this type of copying is justified only if there are no reasonable sources from which a copy can be obtained. Elimination of the "one article" restriction of paragraph (d) would be harmful to authors and copyright owners, and the record does not show significant denial of access to users because of this restriction.

D. Eliminate All Photocopying Restrictions for Not-for-Profit Institutions

1. Analysis of the proposal

Richard Grefrath, Chairman of the University of Nevada at Reno Library Policy Committee on Copyright, proposed the elimination of "all photocopying restrictions for not-for-profit institutions."<sup>8</sup> He contended

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<sup>8</sup>. App. III, Part 2, at 60.

that "[u]niversities should be entitled to an exemption from paying royalties, etc. just as various kinds of otherwise taxable income is exempt from income tax."<sup>9/</sup> This observation overlooks the distinction between taxes (paid by all to the government and redistributed for the common good) and copyright royalties (paid by users of copyrighted works to private owners of that property). The government appropriately exempts certain income from taxation; absent compelling justification, it is not appropriate for the government to mandate free use of private property.

The Grefrath proposal hearkens back to those made throughout the copyright revision effort to legislate a blanket exemption for nonprofit use of copyrighted works. Congress rejected all such proposals.<sup>10/</sup> Needless to say, a photocopying exemption for nonprofit institutions would completely upset the statutory framework of §§106-118 and the §108 balance since only commercial enterprises would be restrained in their photocopying practices.

## 2. Copyright Office recommendation

The Copyright Office sees no merit in a blanket exemption for not-for-profit institutions. Proposals similar to this were considered by Congress previously and rejected. The record before us in no way supports the need for such an exemption for users to have appropriate access to copyrighted works. Authors and copyright owners would clearly be detrimentally affected.

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9. Id.

10. See H.R. Rep. No. 1476 at 66-67.

E. "Compulsory License" for Copying by Federal Agencies

1. Analysis of the proposal

A proposal by Gerald M. Coble, Head, Naval General Library Services, Pensacola, would create a compulsory license for federal agencies, although not designated as such, to reproduce copyrighted books, subject to compensation on the basis, for example, of the GSA FSC Schedule 76 pricing in effect at the time of reproduction.<sup>11</sup>/ Mr. Coble believed federal agencies should be able, subject to compensation to copyright holders, to reproduce multiple copies of entire in-print, out-of-print, and future books, either in the same format or in microfiche, video-disc, tape, electronic, and other formats without first obtaining permission.

As justification, Mr. Coble cited present and future cases in which the military departments, NASA, and other agencies may need or wish to transfer library materials to restricted, perhaps far away, habitats, such as space stations and submarines, where severe space and/or weight limitations would apply.

2. Copyright Office recommendation

To the extent that the mission of the federal agency requires transfer of books to microfiche and other formats because of space and weight limitations governing restricted habitats, the Copyright Office believes that most, if not all, publishers would readily give permission to reproduce the needed materials at a reasonable royalty. The Office does not favor the introduction of another compulsory license into the statute, even if the compensation accorded is essentially market price. The principle of copyright control -- the right to grant or deny permission

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<sup>11</sup>. App. IV, Part 2, at 8. The proposal was apparently restricted to books.

-- should not be further diluted absent compelling justification. The Office believes that the situation addressed by the proposal does not warrant special legislation.

F. Applicability of Paragraphs (d) and (e) of Section 108 to Unpublished Materials

1. Analysis of the proposal

The Society of American Archivists testified that many archivists individually, and on the advice of legal experts, interpret paragraphs (d) and (e) of §108 as applicable to copying of unpublished materials.<sup>12/</sup> These archivists point out that paragraphs (d) and (e), in contrast to paragraphs (b) and (c) of §108 contain no specific references to "unpublished" or "published" works. Therefore, it is argued that (d) and (e) apply both to unpublished and published works. Other archivists, however, are uncertain whether the privileges of (d) and (e) apply to unpublished works and refuse to copy such materials. The Society of American Archivists therefore requested "clarification" of the applicability of these paragraphs to unpublished works.<sup>13/</sup>

Earlier in this report,<sup>14/</sup> we analyzed this issue and noted arguments in favor of a narrower reading of (d) and (e) which would exclude unpublished works. The arguments against coverage of unpublished works are especially strong in the case of paragraph (e). Moreover, §108 is, in principle but not detail, an extension of the fair use doctrine. Traditionally, fair use has had minimal applicability to unpublished

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12. Statement of Dr. Carolyn Wallace, 2 Washington Hearing, App. IV, Part 1 at 66, 68-69.

13. App. IV, Part 2, at 96.

14. See text supra, at 86.

works.<sup>15/</sup> If authors elect not to disseminate their works to the public (a prerogative they have while the works are under copyright), libraries should not ordinarily be permitted to provide copies to the public without the permission of the author/copyright owner. Paragraph (b) of section 108 allows copying by archives "solely for purposes of preservation and security or for deposit for research use in another library or archives. . . ." This paragraph does not permit further copying for patron use, but its limitations are essentially nugatory if archives are free to make copies under paragraphs (d) and (e).

## 2. Copyright Office recommendation

The Copyright Office believes that Congress intended to exclude unpublished works from coverage by paragraphs (d) and (e) of section 108. Certain phrases in (e) (requirement of "reasonable investigation;" reference to "fair price") are consistent only with an interpretation that the paragraph does not cover unpublished works. While the text of paragraph (d) is somewhat less clear, the references to "copyrighted collection" and "periodical issue" (unpublished periodicals are rare), taken together with the express limitations of paragraph (b), lead us to conclude that unpublished works were intended to be excluded from paragraph (d) as well. The Office therefore regards the Society of American Archivists proposal as a request to change, rather than clarify, the law.

Viewed in this light, the Copyright Office recommends against adoption of the Society of American Archivists' proposal. The Office believes that the critical needs of users for access to unpublished materials are provided for adequately by paragraph (b) of §108 and by the

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15. See S. Rep. No. 473, at 64.



provision in §301 which, by preempting common law copyright, effectively makes unpublished works accessible to scholars on terms more favorable than the law before 1978.<sup>16/</sup> In the event that Congress is concerned about the ambiguity which The Society of American Archivists finds in §108(d) and (e), we recommend that any legislative action confine subsections (d) and (e) to published works.

G. Copyright Royalty Meter on Photocopying Machines

1. Analysis of the proposal

A proposal to amend the Copyright Act to require manufacturers of photocopying machines to place copyright royalty meters on most machines was submitted by Irving Horowitz, a professor of social science at Rutgers University and the publisher and president of Transaction Publications of Rutgers.<sup>17/</sup> The basic features of the proposal are that manufacturers would be required to place "copyright controllers" on the machines so that they could be operated only with a device, such as a coded card to which has been added the ISBN or ISSN numbers of the book or periodical. Each time a copy is made a record would be generated of the number of copies made and the name of the work, the publisher of the work, and the user. Assuming that the publisher and user participate in the Copyright Clearance Center or similar licensing system, the machines would also be designed to calculate the amount of the royalty and prepare bills periodically.

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16. Under the prior Act of March 4, 1909, ch. 320, 35 Stat. 1075, unregistered unpublished works (including all literary works) were theoretically protected in perpetuity by state statutory or common law, unless rights were abrogated by state law.

17. New York Hearing, App. VI, Part 1, at 159-181.

Professor Horowitz contended that the necessary technology exists to implement his proposed system; all that is required is a legislative policy decision to establish the legal obligation. Professor Horowitz acknowledged that his proposal would not lead to copyright royalty payments for all photocopying of copyrighted works, but he believed it would capture perhaps 65 percent of the appropriate payments.<sup>18/</sup>

As reflected in the hearing record,<sup>19/</sup> there are a number of problems and concerns about a comprehensive scheme to collect photocopying royalties. Solutions may be possible; but there are difficult issues to resolve. For example: does fair use remain valid? (Professor Horowitz thought copying machines could be engineered to make one copy without activating the metering device, but he did not favor this approach.)<sup>20/</sup> Will the machines be registered? (Probably so.) Will they be inspected, to ensure against illegal removal of the copyright controlling equipment? If so, by whom? (Licensed jukeboxes are inspected by performing rights societies to ensure compliance with the compulsory license of 17 U.S.C. 116, but inspection of machines to ensure a certain function seems more difficult.) How does the system handle publications which lack an ISBN or ISSN number, or publications not registered with the CCC or another licensing system?

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18. Id. at 169.

19. Id. at 164-172.

20. Id. at 171

There is of course the overriding policy question of requiring an inhibiting factor on machines -- at an undetermined administrative cost with respect to operating efficiency -- which are used at least a substantial portion of the time for copying uncopyrighted material, or material for which no one would claim a royalty payment.

## 2. Copyright Office recommendation

It is tempting to seek to harness technology to resolve a problem created by technology. A comprehensive system for monitoring copying activities and collecting royalties for each copy has much merit, including a fairly precise fixing of payments per actual benefit (use). Nevertheless, the Copyright Office has doubts that a legislative scheme based upon copying-inhibiting devices is the best solution to the photocopying problem, even if politically feasible. The Office therefore is not prepared to recommend that a copyright meter scheme be imposed by Congress.

We recommend that further thought be given to various kinds of more or less comprehensive collective arrangements such as (1) a copyright surcharge on photocopying equipment used at certain locations in certain types of institutions or organizations,<sup>21/</sup> and (2) systems which might base royalties on a certain percentage of the photocopying impressions made on

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<sup>21/</sup> A surcharge on home recording equipment and blank tapes was proposed by Senator Mathias and Representative Edwards in the 97th Congress as a solution to the somewhat analogous problem of home taping of copyrighted works. Amendment No. 1333 to S. 1758, and H.R. 5705, both 97th Cong., 2d Sess. (1982).

machines located at certain places in certain types of institutions or organizations. The actual percentages might be determined by sampling techniques.<sup>22/</sup>

#### H. Investigative Enforcement Division in the Copyright Office

##### 1. Analysis of the proposal

Martin Levin, President of the Book Publishing Division of the Times-Mirror Company proposed creation of an investigative enforcement division in the Copyright Office to receive and investigate complaints about unauthorized photocopying (with subpoena power), to develop a public record, and to take some kind of punitive action in cases of flagrant, repeated unauthorized copying.<sup>23/</sup> Other details of the proposal included: denial of standing to sue to a publisher based on the agency investigation, if the publisher is not a member of the Copyright Clearance Center or fails to respond to permission requests in a reasonable manner; assessment of an annual fee on every piece of duplicating equipment, to be paid into the Copyright Office and distributed to publishers on the basis of sampling of the material copied by users; and placement of a copyright warning by the manufacturer on each piece of "duplicating material" made available to the public.<sup>24/</sup>

In justification, Mr. Levin expressed the view that there is a clear constitutional basis for protection of the rights of authorship, but that the remedies provided by the current Act are ineffective. In his view

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22. For example, see the photocopying compensation scheme of a draft bill under consideration in the Federal Republic of Germany, supra, Chapter VII, notes 106 to 116 and associated text.

23. New York Hearing, at 35-49.

24. Id. at 39-40.

present photocopying practices constitute a "flagrant abuse" of the rights of authors and publishers.<sup>25/</sup> He contended that the legal remedies of the Act are "difficult and distasteful, also, uneconomic"<sup>26/</sup> for publishers to exercise. A government agency, such as the Copyright Office, equipped with a legislative mandate and subpoena powers would be able to enforce the law more effectively.

The denial of standing to sue to publishers would, he contended encourage "negligent or reluctant publishers and authors to join in an orderly method to make their materials available."<sup>27/</sup> A surcharge on duplicating equipment would support a type of compulsory license to authorize "nonflagrant copying." Finally, under Mr. Levin's proposal, the required copyright warning on "duplicating material"<sup>28/</sup> would bring the requirements of the Act to the attention of users.

## 2. Copyright Office recommendation

Civil enforcement of copyright is presently the right and responsibility of copyright owners and authors. The remedies accorded in the United States copyright statute unquestionably compare favorably with the remedies in foreign copyright laws, and may arguably be the strongest of all. Injunctive relief is readily granted in copyright cases on the basis of a public registration record and a prima facie showing of infringement. Actual damages and lost profits may be recovered in unlimited amounts, to the extent proved. Perhaps most significantly,

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25. Id. at 39.

26. Id. at 36.

27. Id. at 39.

28. It is not entirely clear whether this phrase refers to equipment and copying paper, or the latter alone.

statutory damages are available up to \$10,000 in ordinary cases and up to \$50,000 (if the infringement is willful) for the infringement of a given work, without proof of actual damages. In cases of criminal infringement, the Government prosecutes and the potential penalties of one year in jail and \$25,000 are high compared to most countries.<sup>29/</sup>

The Copyright Office recommends against creation of an investigative enforcement division in the Copyright Office or in any other agency, to enforce the Copyright Act against unauthorized photocopiers. Existing civil and criminal remedies are strong. Publishers have recently and successfully invoked their rights in several lawsuits. Litigation to correct flagrant abuses, concerted efforts to develop workable guidelines by all parties concerned, and further efforts to educate the public about the rights of authors and copyright owners, are recommended rather than a new enforcement bureaucracy.

One part of Mr. Levin's proposal, the surcharge on photocopying equipment should be given further consideration. See the discussion earlier in this chapter.<sup>30/</sup>

## I. Archival Preservation of Published Works

### 1. Analysis of the proposal

Section 108(b) of the Copyright Act accords libraries and archives the right to reproduce unpublished works in facsimile form solely for purposes of preservation and security or for deposit for research use

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<sup>29.</sup> For example, in the United Kingdom, the maximum penalty for criminal copyright infringement is 50 British pounds (approximately \$80). Copyright Act of November 5, 1976, 4 and 5 Eliz. II, Ch. 74, Section 21(9), contained in Copyright Laws and Treaties of the World (Unesco) (1982).

<sup>30.</sup> Supra, text associated with note 24.

in another library or archives. Paragraph (c) of section 108 permits facsimile reproduction of published works solely for the purposes of replacement of a copy that is damaged, deteriorating, lost, or stolen --not for purposes of preservation generally. Moreover, the facsimile can be made only after the library first determines, after a reasonable effort, that an unused replacement cannot be obtained at a fair price.

Dr. Martin Cummings on behalf of the National Library of Medicine proposed an amendment to paragraph (c), in the form of the following additional sentence:

"The right reproduction under this section applies to a copy or phonorecord of a published work duplicated in facsimile form, in the same or in a different medium, for the purpose of archival preservation."<sup>31/</sup>

The purpose of the amendment is two-fold: to extend a broad new privilege to libraries permitting preservation of published works, and, apparently, to broaden the scope of the phrase "facsimile form" to include facsimile reproduction "in the same or in a different medium." Elsewhere in §108, the phrase "facsimile form" is used without the phrase "in the same or in a different medium."

As justification for this proposal, Dr. Cummings cited the statutory responsibility of the NLM <sup>32/</sup> to "preserve books, periodicals, prints, films, recordings, and other library materials pertinent to medicine; . . ." He pointed out that "[w]aiting to film books and journals

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31. App. VII, at 13-15.

32. National Library of Medicine Act, §276, 42 U.S.C §§275-280(a)-1 (1976).

until the paper becomes badly embrittled and discolored adds to the destruction of the material and reduces considerably the quality of the film copy through a decrease in the contrast between ink and paper." <sup>33/</sup> He also contended that the "most efficient way to operate a micropreservation program involving serials is to preserve runs as opposed to selecting individual volumes or issues for filming."<sup>34/</sup>

For NLM to follow the procedure of present §108(c) would, he argued, "be self-defeating. The condition of the paper in replacement copies . . . would be as deteriorated as the paper in the NLM copy, less any handling or use our copy might have received. Thus to replace a deteriorating copy with a similarly deteriorating copy would serve no useful purpose."<sup>35/</sup> He concluded with the observation that "section 108(c) does not recognize the archival responsibility of national libraries."<sup>36/</sup>

## 2. Copyright Office recommendation

The technology at hand now makes possible not only mass data storage, but also mass facsimile document storage and from data and document storage thus created, electronic transmission, and display and printout at multiple remote sites.<sup>37/</sup> Several projects underway are moving

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33. App. VII, at 13.

34. Id. at 14.

35. Id.

36. Id.

37. These new technologies are discussed in chapter VI of this report, supra, at 232.



rapidly to employ and deploy this technology. Among them, the Library of Congress has recently announced an experimental, pilot project "to use laser disk technology for information preservation and management."<sup>38</sup>/

In the creation of massive electronic archives of published works, it is not realistically possible to separate the storage and preservation functions from the inevitable document fulfillment function — i.e., copying. Indeed, the Library of Congress' announcement, while focusing on the preservation aspects of its project, noted that "disk storage may offer the public unparalleled high-speed access to some of the most fragile and important materials in the Library's vast collections,"<sup>39</sup>/ and that the Library "will closely evaluate each part of this pilot project with an eye toward expanded applications in the future."<sup>40</sup>/ It is incredible that such archives will be created, at vast expense, and not ultimately brought into use to transmit, display, and copy the works included. To treat only one aspect of this formidable enterprise, as by a general exemption to copy protected works into such systems "for the purpose of archival preservation" might well prejudice that effort.

The legislative history of the current Act indicates that Congress did not intend to include reproduction of a work in "'machine-readable' language in an information system"<sup>41</sup>/ within the phrase "facsimile form." Rather the phrase was intended to refer to reproduction "by microfilm or electrostatic process."<sup>42</sup>/

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38. Press Release #PR 82-118, December 7, 1982.

39. Id.

40. Id.

41. H.R. Rep. No. 2237 at 66 and H.R. Rep. No. 1476 at 75.

42. Id.

The Copyright Office is not prepared to support a broad new privilege allowing libraries largely unrestrained preservation copying rights with respect to published works, and permitting storage in machine-readable, computer-accessed systems. The Office therefore cannot recommend the NLM proposal. However, the Office also recognizes that libraries should be able to employ new preservation techniques, provided adequate copyright controls are legislated, both with respect to the preservation copying and information supplying functions of libraries. We recommend a thorough review of these issues by the library, user, author, and publishing communities with a view to developing a common legislative position.

J. Regulatory Authority to Clarify Terms and Issue Guidelines

1. Analysis of the proposal

The Authors League of America proposed an amendment of §108 "to provide that the Register of Copyrights establish Regulations under Section 108 to clarify and amplify the definitions of terms, and provide guidelines for the various types of copying dealt with by the Section."<sup>43</sup>/ As justification for this broad, new regulatory authority, the Authors League asserted that "much unauthorized copying results from misinterpretation, inadvertent or willful . . .", that "the interests of users, librarians, authors and publishers all would be served well by the promulgation of authoritative Regulations . . .", and that "[t]his approach would eliminate much confusion, controversy and uncertainty."<sup>44</sup>/

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43. App. VII, at 16.

44. Id.

The Copyright Office presently has only very narrow, express authority to issue regulations relating to §108: the warning of copyright specified by (d)(2) and (e)(2). The general regulatory authority of the Copyright Office<sup>45/</sup> has not traditionally been invoked to issue guidelines relating to infringing activities; the general authority is understood to refer to administration of the registration-recording system and the compulsory license provisions of the Copyright Act.

While the record is replete with requests for interpretation of terms and issuance of guidelines,<sup>46/</sup> no other commentator specifically supported the Authors League proposal for broad, new regulatory authority.

## 2. Copyright Office recommendation

The record before us demonstrates divergent interpretations of key terms or phrases in the Act and the compelling need for guidelines. To this extent, the Copyright Office fully shares the observations of the Authors League. The Office believes, however, that clarification of terms and new guidelines must be achieved by agreement of the principal interests affected by photocopying practices preferably, or by legislative clarification. We can understand the frustration of some parties which may lead to calls for regulatory action, but we believe consensus and voluntary accommodation (or in their absence, legislative action) are the appropriate solutions for these enormously complex, social policy issues. Elsewhere in this report,<sup>47/</sup> we have recommended that Congress again express direct

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45. 17 U.S.C. §702

46. Infra, at Q.

47. Chapter IX.

interest in such arrangements and encourage the development of consensus and voluntary guidelines. The Office is fully prepared to assist in whatever way the Congress or the parties deem appropriate.

K. Reproduction of Entire Musical Works

1. Analysis of the proposal

An ad hoc joint committee of the Music Library Association, and the Music Publishers' Association of the United States presented a proposal to add a new subsection granting copying privileges with respect to entire musical works (or substantial parts thereof) following an unsuccessful diligent search for the name and address of the copyright proprietor, including a search of the records of the Copyright Office.<sup>48/</sup> The text of the proposal is as follows:

"The rights of reproduction granted by subsection (e) may be exercised by libraries and archives in respect of musical works if the library or archive shall first undertake a reasonably diligent search for the copyright proprietor of such musical work, which search shall include, but not be limited to, the records of the Copyright Office. If, following such search, the copyright proprietor cannot be located, the library or archive may reproduce such musical work in accordance with subsection (e). If the search discloses the identity and location of the copyright proprietor, no such reproduction may be undertaken without the approval of the copyright proprietor."<sup>49/</sup>

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48. App. VII, at 147-152. While another major music publisher organization, the National Music Publishers' Association, was not a party to the negotiations leading to this proposal, we understand that they are aware of the proposal, and the record before the Copyright Office contains no objection thereto.

49. Id. at 152.

Paragraph (h) of the current Act excludes musical works from the copying privileges of §108 except with respect to paragraphs (b) and (c). Music librarians have asserted that fair use alone is not adequate to meet the needs of musicologists. The above proposal is a partial response to those concerns. In essence, the proposal applies to serious musical works, which are the subject of research or scholarship; the copying privilege it would grant is premised on the principle that, where a diligent search fails to disclose the copyright proprietor, the copying privileges now accorded book and journal librarians and their patrons by paragraph (e) should be extended to music librarians and their patrons. A reasonably diligent search would be required, and this requirement may be somewhat more stringent than the "reasonable investigation" standard imposed on book and journal librarians and patrons. However, the objective of the search differs: under this proposal, the identity and address of the copyright owner must be sought rather than a copy at a fair price. If the search is negative, copying may occur. If the search discloses the identity and location of the copyright proprietor, copying may occur only with the permission of the copyright proprietor.

Prior to the submission of the joint proposal discussed above, the Music Library Association alone submitted a general proposal in the form of a Resolution adopted at its annual meeting in 1982 that "Congress enact legislation permitting the reproduction of a musical work under PL 94-553, [Copyright Act] §108."<sup>50</sup>/ It is not clear whether the later joint proposal, coupled perhaps with the call for negotiating sessions between

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<sup>50</sup>. App. VI, Part 2, at 322.

music librarians and music publishers (stressed by the Music Library Association in its later statement) superseded, or was the equivalent of, the 1982 Resolution.

## 2. Copyright Office recommendation

The Copyright Office endorses the substance of the proposal to accord a copying privilege for out-of-print musical works after an unsuccessful, reasonably diligent search for the name and address of the copyright proprietor. The Office considers the proposal a salutary example of the positive results that can be achieved by persistent, good faith negotiations between the principal parties affected by a photocopying practice or the Act's photocopying provisions.

As a technical matter, it may be more appropriate to amend paragraph (e) rather than add a new subsection (j). In any case, paragraph (h) would require consequential amendment.

The Copyright Office is not prepared to support any other new "108 copying" privileges with respect to musical works. The Office believes that adoption of the above amendment, together with the existing fair use exemption, will provide adequate copying privileges to facilitate musicological research. If the 1982 Resolution of the Music Library Association represents a broader proposal than the above amendment, the Office recommends rejection of the Resolution's proposal.

## L. Clarification of the 108(a)(3) Notice

# 1. Analysis of the proposal

Earlier in this report,<sup>51/</sup> we discussed the divergent interpretations of the notice requirement of §108(a)(3) and the unsuccessful efforts to reach a practical compromise of these viewpoints. Publishers have generally argued that §108(a)(3) requires use of the Chapter 4 statutory notice if it appears on the copy or phonorecord. Librarians have generally disagreed, contending that a warning that the work may be in copyright is sufficient. While expressing a willingness to negotiate an agreement on a more general notice if the statutory notice cannot be found, the Association of American Publishers proposed the following clarifying amendment of section 108(a)(3):<sup>52/</sup>

the reproduction or distribution of the work  
includes the notice of copyright as provided in  
Section 401(b) of this title.

# 2. Copyright Office recommendation

The library community has clearly not accepted the publishers' interpretation of the Act, with a few exceptions; if Congress intended that the Chapter 4 notice be reproduced on "108 authorized" copies and phonorecords, a clarifying amendment is necessary. The amendment should reference §402(b) as well as §401(b) to take account of phonorecords.

The Office regrets that the publishers and librarians did not reach a practical accommodation on this point, especially since we recognize that the numerous acceptable locations for the Chapter 4 notice<sup>53/</sup>

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51. See, text supra III at 68.

52. App. VII, at 42-43.

53. See 37 C.F.R. §201.20, which provides 8 variant locations for book material, and 11 variant locations for periodicals.

may impose administrative burdens on librarians in complying with §108(a)(3). We continue to urge that the parties reach a voluntary agreement on this point.

M. Inflationary Adjustment of Statutory Damages

1. Analysis of the proposal

The Association of American Publishers recommended "changing the statutory damages specified in Section 504(c)(1) . . . to reflect Congressional intent by adjusting for unanticipated double-digit inflation. . . ." <sup>54</sup>/ Other reasons advanced for the proposal were deterrence of would-be infringers and increased incentive to copyright owners to enforce their rights. No monetary amount was specified; we assume the proposal is a request for a one-time inflationary adjustment of the statutory damage figures.

Under the current Act, the copyright owner is entitled to elect statutory damages at any time during trial before the court renders final judgment, and the court must then generally award an amount between \$250 and \$10,000 for each separate and independent work infringed. <sup>55</sup>/ The award to the copyright owner in infringement actions involving multiple, independent works is potentially enormous. Moreover, in case of willful infringement, the court has discretion to award a maximum of \$50,000 for each separate and independent work that has been infringed. However, in

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54. App. VII, at 43.

55. H.R. Rep. No. 1476, at 162.



case of good faith invocation of fair use, librarians and teachers in nonprofit institutions are insulated from any statutory damage award.<sup>56/</sup> The AAP proposal does not seek to change this provision.

The United States copyright law is virtually, if not actually, alone among countries of the world in providing statutory damages as a remedy in copyright infringement actions. Statutory damages are an extraordinarily powerful instrument for any copyright holder. While we can note the high rate of inflation since 1978, it is also noteworthy that the statutory damage amounts remained unchanged at \$250 to \$5000 from 1909 through 1977.<sup>57/</sup>

## 2. Copyright Office recommendation

A significant portion of the unauthorized photocopying disclosed by the King Report occurs in nonprofit institutions, whose infringing copying is not subject to statutory damages if the teacher or librarian acted in the honest belief that the copying was exempt as a fair use. The plaintiff-copyright owner has the burden of proving lack of good faith, according to the 1976 House Report.<sup>58/</sup> For this reason, and because the range of statutory damages is already wide, the Copyright Office doubts that an increase in the statutory damage amounts would have a deterrent effect or encourage greater assertion of rights with respect to the nonprofit portion of unauthorized photocopying.

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<sup>56.</sup> 17 U.S.C. §504(c)(2) (1980).

<sup>57.</sup> Section 25, later section 101(b), of the Act of March 4, 1909, ch. 320, 35 Stat. 1075.

<sup>58.</sup> H.R. Rep. No. 1476, at 163 (1976).

The record before us does not support an increase in statutory damages generally, and the existing "teacher/librarian innocent infringer" provision makes this remedy less effective in curtailing unauthorized library reproduction of works. The Office recognizes nonetheless that the innocent infringer provision is an important part of the \$108 balance and recommends no change in this feature of the statutory damages provision.

N. The "Umbrella Statute" Amendment to Chapter 5

1. Analysis of the proposal

The Association of American Publishers (AAP) recommended adding a new section 511 to the Copyright Act, limiting the remedies available for infringing reproduction of portions of particular works in certain cases -- the so-called "umbrella statute."<sup>59/</sup> The purpose of the amendment, according to the AAP, is "to balance the rights of copyright owners and needs of users of certain specified works -- contributions to scientific, technical, medical, and business periodicals and proceedings -- in particular circumstances, namely, reproduction for purposes of research or study where there is an immediate need for copies."

The amendment is intended to encourage the creation of multi-copyright owner licensing systems, such as the Copyright Clearance Center, and to encourage user participation therein, by limiting the remedies that would otherwise be available against infringing reproduction.

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59. App. VII, at 44-52.

The "umbrella statute" proposal was developed by an ad hoc task force of librarians from for-profit corporations and both for-profit and nonprofit journal publishers. The Council of Engineering and Scientific Society Executives formally endorsed the "umbrella statute."<sup>60/</sup>

The basic scheme of the "umbrella statute" is to limit copyright holders to the remedy of a "reasonable copying fee" if:

- 1) the article or contribution reproduced was not entered in a qualified licensing program or qualified licensing system at the time the reproduction was made;
- 2) the facsimile reproduction was made from an original or from a lawfully made facsimile copy;
- 3) the reproduction was used solely for purposes of research or study, including job-related research or study; and
- 4) the reproduction includes a notice of copyright (if present on the work reproduced).

Stated another way, a publisher who does not enter his works in a licensing system or offer a licensing program risks the loss of injunctive relief, actual damages and lost profits, statutory damages, attorney fees, and impoundment of the infringing copies or phonorecords; the criminal infringement remedy is also withdrawn. These remedies are not lost, however, if the user does not participate in a qualified licensing system (apparently without regard to publisher participation in a different system or licensing program), or if the user was held liable as an infringer of material entered in a qualified licensing program or qualified licensing system, within the three years preceding the most recent copying.

The scheme therefore encourages both publishers and users to participate in certain collective arrangements, but the initial and primary compulsion is placed on publishers: if their works are not offered in

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<sup>60.</sup> Id. at 57. Other letters of endorsement appear in Appendix VII at 55-61.

qualified collective arrangements, they risk loss of a whole range of otherwise available remedies with respect to any copier who meets the conditions of the "umbrella statute;" users who fail to participate in qualified collective arrangements are no worse off than any alleged infringer.

The "umbrella statute" is narrowly drawn with respect to the kinds of works, copying of which may be affected -- scientific, technical, medical, or business periodical or conference proceedings -- and with respect to the motivation of the copier -- purposes of research and study, excluding public distribution, advertising or promotional activities, archival preservation, or deposit in another collection. "Works that to any substantial extent include social history or narrative, fiction, poetry, or belles lettres are excluded from and are not subject to the limitations of the . . . [umbrella statute]."61/

## 2. Copyright Office recommendation

The Copyright Office strongly favors the development of voluntary guidelines and collective arrangements to solve some, if not all, of the problems concerning library reproduction of copyrighted works. We therefore welcome efforts such as the ad hoc task force's "umbrella statute," which was formally submitted to us by the Association of American Publishers. The Office supports the principle of the "umbrella statute," and recommends Congressional consideration of the proposal.

The proposal places no new burden on users, except basically that of participation in a licensing system as a condition for potential loss of a copyright owner's remedies. Nonparticipating users are not subject to

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61. C. Risher, How Publishers and Librarians Can Agree on Copyright, 57 Wilson Library Bulletin, 232-233, November, 1982.

any new penalties. Copyright owners, however, are compelled either to offer a qualified licensing program or to join a qualified licensing system, or risk the loss of all remedies except a right to a reasonable copying fee.

This is a strong sanction since injunctive relief and statutory damages are the two strongest remedies now available to copyright owners. The Copyright Office believes the sanction is justified by the public benefit that flows from collective arrangements. Also, a "carrot-and-stick" approach like the "umbrella statute" seems much preferable to a government-regulated compulsory licensing system, which might be an alternative last-resort solution to the library photocopying problems.

The narrow scope of the publications covered by the proposal is not at all objectionable since the S-T-M and business publications included are the works most frequently photocopied.<sup>62/</sup>

Finally, the Office recommends that Congress require recordation with the Copyright Office of a document setting forth the basic terms and conditions of any "qualified licensing program" or "qualified licensing system" as part of the statutory definitions of those phrases. Public recordation would inform potential user participants about, and more clearly identify, "qualified" programs or systems.

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<sup>62</sup>. The Copyright Office has some concern about the copying prices established by licensing systems, but for now, we believe that concern can be left to the anti-trust law.

O. Publishers 'Nonresponsiveness to Permissions Requests

1. Analysis of the proposal

Ben Weil, Senior Staff Advisor of Exxon Research and Engineering Company, made several proposals for statutory change without specifying the precise nature of the amendments.

First, he requested a legislative change to permit copying "in those instances where a user has exerted reasonable efforts to obtain permissions from publishers but the publishers have not responded."<sup>63</sup>/ He testified to a nearly 20 percent nonresponse rate even after 9 months and the dispatch of 3 follow-up letters, in operating a large copyright-compliance program.<sup>64</sup>/

Mr. Weil also experienced problems with publishers who "cannot give photocopying permissions because they do not seek or obtain copyright transfers from their authors. . . .", and with publishers who tell him that "the copyright law requires them to insist on having specific, lengthy credit lines added to all photocopies made under license. . . ."<sup>65</sup>/ The latter requirement, he said, "might well double our operating costs if it becomes universal. . . ."<sup>66</sup>/ In reference to these problems, Mr. Weil made nonspecific suggestions for a change regarding "the statutory granting of all rights to authors, and the requirement that they must transfer these in writing to a journal if the journal is to acquire them."<sup>67</sup>/

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63. New York Hearing, at 130.

64. Id. at 127-128. Exxon Research and Engineering Company is registered with the Copyright Clearance Center (CCC); the permissions requests were directed to non-CCC publishers.

65. Id. at 130.

66. Id.

67. Id. at 131.

The time and effort spent in attempting to obtain permissions from nonresponsive publishers tends to consume the large part of an organization's copyright permissions work.<sup>68/</sup> It is not clear that the rate of nonresponsiveness is significant. The King data suggest a very high publisher response to properly identified permission requests.<sup>69/</sup> Mr. Weil seemed to acknowledge this point, saying he made "no assertions that our problems are common to all libraries. Our program is Exxon's own best reading of what is reasonably required of a large corporation that seeks ethically to provide service to individuals when they need photocopies."<sup>70/</sup>

## 2. Copyright Office recommendation

The record before us does not warrant statutory changes to permit broader copying privileges in the case of nonresponsiveness to permissions requests. Publisher responsiveness seems excellent in general. The Office recognizes that the small incidence of nonresponsiveness is nevertheless time-consuming and burdensome. We hope that other recommendations -- such as the "umbrella statute" (supported in principle), the general recommendations for collective arrangements and development of guidelines, and, in the future perhaps, new systems for remunerating authors and copyright owners for photocopying -- will further ameliorate the "problem" of publisher nonresponsiveness.

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68. See the discussion at 48-49 supra, chapter V.

69. KRT 2.21.

70. New York Hearings, at 130.

The Office would not support any change in the fundamental principle that all rights belong initially to the author, or the requirement that any transfer of the copyright must be in writing. These principles constitute salient authors' rights; they should not be compromised.

Finally, the matter of credit acknowledgments in the United States has always been left to private contractual arrangements. Copyright laws ordinarily do not, and the United States law does not, curtail the copyright owner's right to require credits -- even if lengthy; nor do copyright laws require lengthy credits. The Copyright Office believes this question is best left to contract and the reasonableness of publishers.

P. Miscellaneous Proposals

1. Subpoena power to obtain library photocopying records

Alan Wittman, then publisher of Wiley Interscience Journals (part of John Wiley & Sons), offered an impromptu suggestion while testifying at our New York hearing, that librarians should "volunteer their records to a neutral audit."<sup>71</sup>/ He recommended that the Office should "consider the creation of a mechanism which includes some kind of neutral body which would examine the records of photocopying transactions of a cross-section of libraries. . . ,"<sup>72</sup>/ and if the libraries do not cooperate in such an audit, the Office should "consider recommending legislation which would empower some kind of neutral body to subpoena those records."<sup>73</sup>/

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71. Id. at 104.

72. Id.

73. Id.



The Copyright Office is not in favor of any new regulatory mechanism either within the Office or a specially created body, which would have power to subpoena library records. The Office stresses resort to collective arrangements and voluntary, agreed guidelines instead of punitive sanctions.

2. Authority to prohibit "in terrorem" copyright notices

In the last few years, educators have protested the use of warning language in notices of copyright, which they consider misleading and illegal because the language does not acknowledge fair use or the other exemptions from the exclusive rights. The Copyright Office declined, when petitioned by educators, to issue regulations prohibiting these so-called "in terrorem" notices. Robert Hogan, Executive Director of the National Council of Teachers of English, proposed at our New York hearing that the Office seek the authority from Congress to prohibit warning language in the copyright notice beyond that specified as the elements of the statutory notice. <sup>74</sup>/

This proposal is largely ungermane to our review of §108 since it concerns fair use primarily. However, the Office has considered the request, and declines the invitation to seek this new authority from Congress. The Office does not agree that warning statements in notices are usually misleading, and, in any event, would not wish to regulate additional statements in the notice. Flat prohibition of any statement beyond the bare essentials of the statutory notice would be unreasonable. (For example, there are an infinite number of special statements that would be appropriate, such as references to early versions, limitations on the claim, etc.) Foregoing a flat prohibition, we would be left with a need to

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74. Id. at 374.

make fine distinctions; the "problem" does not warrant new regulatory authority.

Q. Requests for Clarification of Terms or Additional Guidelines

Our review of the legislative proposals of record shows that, while many serious proposals were advanced for statutory change, their number is not very large considering the experience reviewed, the complexity of the issues, and the social significance of the whole question of library reproduction of copyrighted works. Our review of the experience under the Copyright Act and section 108 since 1978 does not disclose universal satisfaction with, or acceptance of, the library photocopying provisions, but most commentators believed that any problems with the statute could be resolved through clarification of terms or additional guidelines.

Throughout this report, the Copyright Office has frequently expressed its own interpretation of particular terms or phrases in the Act. These interpretations may or may not afford guidance to persons who are in genuine doubt about the meaning of certain terms. Others will have different interpretations, or may prefer to reach a common understanding of critical terms and phrases by negotiations among authors, publishers, users, and librarians. As we have frequently observed, the Copyright Office fully supports efforts to reach agreement on clarification of terms and on the creation of new guidelines. Since it may be helpful to the progress of any such attempts in the future, we have prepared the following list of requests for clarification of terms and development of guidelines.

1. Requests for clarification of terms

a. library reserve collections

- b. audiovisual media
- c. library branch systems and consortia
- d. archival preservation
- e. interlibrary arrangements
- f. copyrighted collection
- g. systematic reproduction or distribution

2. Requests for guidelines

- a. review of CONTU guidelines in general and the "rule of 5"
- b. guidelines regarding SDI services
- c. guidelines regarding fair use and the relationship between sections 107 and 108
- d. general, authoritative guidelines regarding sections 107 and 108
- e. duplication of sound recordings
- f. duplication of non-print materials, in general
- g. review of the classroom copying guidelines ("brevity test" especially)
- h. guidelines for interlibrary copying of journals more than 5 years old and all other works
- i. guidelines governing systematic reproduction and distribution
- j. photocopying of foreign materials and copying for foreign libraries
- k. liability of libraries for copying that exceeds fair use and enforcement mechanisms
- l. section 108(g)(1) -- standard of awareness to avoid multiple copying over a period of time
- m. distinguishing types of material which may be photocopied
- n. record-keeping requirements
- o. in-house copying

## IX. COPYRIGHT OFFICE RECOMMENDATIONS

This chapter summarizes the non-statutory and statutory recommendations of the Copyright Office as requested by Congress in title 17 of the U.S. Code, §108(i). Most have been discussed in detail earlier in this report. They reflect our best judgment about possible solutions to the copyright issues relating to library reproduction of copyrighted works based upon

- 1) consultation with representatives of authors, book and periodical publishers, and other owners of copyrighted materials, and with representatives of library users and librarians about their understandings of, and experience under, the Copyright Act, and their proposed solutions, if any;
- 2) the surveys of library reproduction of works, of publishers, and of users reported by King Research, Inc., under contract with the Copyright Office (Libraries, Publishers and Photocopying: Final Report of Surveys Conducted for the United States Copyright Office);
- 3) a review of library reproduction abroad and of the technological developments affecting library reproduction of works; and
- 4) a review of the text and legislative history of the pertinent sections of the Copyright Act.

A. Non-statutory Recommendations.1. Collective licensing arrangements encouraged.

All parties affected by library reproduction of copyrighted works are encouraged to participate in existing collective licensing arrangements, and to develop new collective arrangements to facilitate compensated copying of copyrighted works.

2. Voluntary guidelines encouraged.

Representatives of authors, publishers, librarians, and users should engage in serious discussions with a view to clarification of terms and development of guidelines, both with respect to present photocopying practices and the impact of new technological developments on library use of copyrighted works. The Office recommends that the respective Congressional copyright committees or subcommittees again urge the parties to engage in serious negotiations and report back to them by a certain date.

3. Study of surcharge on equipment.

In the next five-year review, a copyright compensation scheme based upon a surcharge on photocopying equipment used at certain locations and in certain types of institutions or organizations should be studied, taking into account experience with such systems in other countries.

4. Study of compensation systems based on sampling techniques.

In the next five-year review, various systems for copyright compensation based on a percentage of the photocopying impressions made on machines located at certain places in certain types of institutions or organizations, as determined by sampling techniques, should be studied.

5. Further study of new technology issues.

In the next five-year review, issues relating to the impact of new technological developments on library use of copyrighted works should be studied.

## 6. Archival preservation.

Representatives of authors, publishers, users, and librarians should meet to review fully new preservation techniques and their copyright implications and should seek to develop a common position for legislative action by Congress, taking into account the respective interests of libraries and their patrons and of authors and publishers.

## 7. Adequate funding for library services.

Proper recognition of the cost of creating and disseminating protected works in our society requires concomitant understanding at all levels of government of the need for adequate funding of publicly owned libraries to enable them to pay their share of creation-dissemination costs.

## B. Statutory recommendations.<sup>1/</sup>

### 1. Reproduction of out-of-print musical works.

The Copyright Office recommends enactment of the proposal submitted by the Music Library Association and the Music Publishers' Association,<sup>2/</sup> either by amendment of §108(e) or addition of a new paragraph (j) to §108, with consequential amendment of paragraph (h). If enacted, the amendment would permit library reproduction of an entire musical work (or substantial parts thereof) for private study, scholarship, or research following an unsuccessful, diligent search for the name and address of the copyright proprietor of the musical work.

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1. All of the following recommendations concern proposed amendments to the Copyright Law of the United States, title 17 U.S.C. §§101 et seq.

2. See, text supra, VIII, K.

## 2. "Umbrella statute."

The Copyright Office recommends favorable action by Congress on legislation embodying the principle of the so-called "umbrella statute," a proposal developed by an ad hoc task force of librarians and publishers and submitted by the Association of American Publishers.<sup>3/</sup> The proposal would add a new section 511 to the Copyright Act limiting copyright owners to a single remedy -- a reasonable copying fee -- for copyright infringement of their scientific, technical, medical, or business periodicals or proceedings, if certain conditions are met by the user of the work, including membership in a collective licensing arrangement, unless the work was entered in a qualified licensing system or qualified licensing program. The purpose of the "umbrella statute" is to encourage publisher and user participation in collective licensing arrangements. The Copyright Office further recommends that Congress require recordation with the Office of a document setting forth the basic terms and conditions of any qualified licensing program or qualified licensing system.

## 3. Clarification of the "108(a)(3) notice."

The Copyright Office recommends enactment of a clarifying amendment to §108(a)(3) as follows:

"(3) the reproduction or distribution of the work includes the notice of copyright as provided in sections 401 and 402 of this title, if such notice appears on the copy or phonorecord in a position authorized by sections 401(c) and 402(c), respectively, of this title."

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3. The proposal and accompanying documents are set out in App. VII at 41-61.

Publishers have generally interpreted the present Copyright Act as requiring libraries to use the statutory copyright notice on photocopies as a condition of the §108 copying privileges. Librarians have generally disagreed, maintaining that a warning that the work may be in copyright complies with the Act.<sup>4/</sup> The amendment would accept the publishers' interpretation.

4. Clarification that unpublished works are excluded from paragraphs (d) and (e) of section 108.

The Copyright Office recommends an amendment to paragraphs (d) and (e) of §108 to make clear that unpublished works are not within the copying privileges granted therein.<sup>5/</sup> Section 108(d) governs single copying of a small part of a work or one article of a periodical; section 108(e) establishes the conditions under which out-of-print works may be copied — either the entire work or a substantial part thereof. In the case of paragraph (d), the term "published" should be inserted in lieu of the word "copyrighted" each time the latter appears. In the case of paragraph (e), the term "published" should be inserted between "entire" and "work" and should be inserted in lieu of the word "copyrighted."

5. Change in reporting month for the section 108(i) report.

The Copyright Office recommends amendment of paragraph (i) of §108 to permit the filing of the periodic five-year report on or about March 1 of a given year in place of the present January reporting date.

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4. These positions are discussed at III A(3), supra.

5. These issues are discussed at IV A(4)(a) and (c).



This change in the filing date is requested because of the staffing and administrative support problems inherent in preparing a major report during the year-end holiday period.

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